Last page of docket
SHOKT PROCEEDINGS AND ORDERS DATE: [10/12/90]

CASE NBR: [89107671] CSY STATUS: [DECIDED]
SHORT TITLE: [Hunter, Michael]
VERSUS [California] DATE DOCKETED: [053090]
*** CAPITAL CASE *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Apr 20 1990	G	Application (A89-735) to extend the time to file a petition for a writ of certiorari from May 2, 1990 to June 1, 1990, submitted to Justice O'Connor.
2	Apr 23 1990		Application (A89-735) granted by Justice O'Connor extending the time to file until June 1, 1990.
3	May 30 1990	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Jun 29 1990		Order extending time to file response to petition until July 13, 1990.
7	Jul 13 1990		Brief of respondent California in opposition filed.,
8	Jul 19 1990		DISTRIBUTED. September 24, 1990
10	Oct 1 1990		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall. (Detached opinion.)

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 89-7671

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MICHAEL WAYNE HUNTER,

Petitioner.

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

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QUESTION PRESENTED

In a capital murder trial, do the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution require the trial court to grant use immunity to an important defense witness, on the subjects of both guilt and penalty, who would otherwise refuse to testify on the ground of the privilege against self-incrimination?

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STATE OF CALIFORNIA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

Michael Wayne Hunter respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California, which affirmed his sentence of death.

OPINION BELOW

The opinion of the California Supreme Court is reported at 49 Cal.3d 957, 264 Cal.Rptr. 367, 782 P.2d 608. It is reproduced herein as Appendix A. The unreported order denying petitioner's petition for rehearing appears as Appendix B. In the proceedings below, Michael Wayne Hunter, petitioner herein, appeared as defendant and appellant; the People of the State of California appeared as plaintiff and respondent.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(3).

The judgment of the Supreme Court of California was rendered on December 7, 1989, affirming petitioner's conviction of two counts of first degree murder with a multiple murder special circumstance finding, as well as his sentence of death. A petition for rehearing was timely filed on petitioner's behalf, and was denied on February 2, 1990. On April 23, 1990, Justice O'Connor extended the time for filing this petition to and including June 1, 1990. (Appendix, C).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall a person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CONSTITUTION, AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

UNITED STATES CONSTITUTION, AMENDMENT VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UNITED STATES CONSTITUTION, AMENDMENT XIV

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 9, 1984, a jury found petitioner guilty of two counts of murder, with a finding of true as to the special circumstances alleged. At the penalty phase of trial, the jury returned a verdict of death, and the trial court imposed that sentence. The California Supreme Court affirmed the conviction and sentence. (People v. Hunter (1989) 49 Cal.3d 957, 264 Cal.Rptr. 367.)

STATEMENT OF FACTS

The verdict of guilt established that on December 29, 1981, petitioner entered the home of his father and stepmother and killed them with a shotgun. Following the killings, petitioner fled to Mexico with the assistance of his girlfriend, Judith Goldstein, and two of his friends but was later apprehended when he returned to the United States.

At trial the prosecution presented testimony from several witnesses, three of whom testified under grants of immunity, who discussed the animosity between petitioner and his father and stepmother. These witnesses testified about petitioner's numerous threats and plans to kill his father and stepmother.

The defense presented evidence showing the abuse, both physical and mental, petitioner suffered at the hands of his father as a child. The defense also presented evidence showing the abuse inflicted upon petitioner's natural mother, June Hunter, who had died of cancer several years before the killings.

The defense attempted to show that abuse by his father and his feelings toward June Hunter were what triggered the killings. On the day of the homicides, petitioner had attended the funeral for the mother of a friend who had also died of cancer. Petitioner attended the funeral with his girlfriend Judith Goldstein. At the funeral, petitioner became despondent about his own mother's death and the fact his father was still alive. The defense claimed that at the funeral petitioner made the comment "Why do the good die and the bad live on?" Several hours later petitioner entered the home of his father and stepmother and killed them.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Prior to trial, the defense requested the trial court to grant use immunity to Judith Goldstein or in the alternative to continue petitioner's trial until Ms. Goldstein's case was concluded. Ms. Goldstein was petitioner's girlfriend at the time of the killings and had been charged as an accessory after the fact to the murders based upon the assistance she provided petitioner after the murders. At the hearing on the defense request for immunity, defense counsel told the trial court that Ms. Goldstein was a necessary and percipient witness to the events shortly before the homicides. Specifically, the defense

wanted Goldstein to testify about petitioner's state of mind following the funeral and about petitioner's statement that the good die and bad live on. The court refused to order any form of immunity and denied the request for a continuance.

During the guilt phase portion of petitioner's trial, the defense called Ms. Goldstein to testify on petitioner's behalf but she exercised her Fifth Amendment right against self-incrimination because accessory charges were still pending against her. Again the defense requested the court to grant Ms. Goldstein use and/or transactional immunity based, inter alia, on the Sixth and Fifth Amendments to the United States Constitution. Defense counsel asserted that Ms. Goldstein was with petitioner at a funeral several hours before the murders and that she would testify about statements petitioner made while in her company that provided information about his mental state prior to the murders.

Ms. Goldstein's attorney was present at this hearing and informed the court that he had advised his client not to testify. Her attorney also informed the court that her case was scheduled for trial after petitioner's trial and that her case had been continued pursuant to an agreement with the district attorney's office that her case would proceed to trial only after petitioner's trial had been completed.

The district attorney opposed the request for use immunity, and declined on the record, to grant transactional immunity to Goldstein under the provisions of California Penal

Code section 1324.[1] Defense counsel noted that the prosecutor had requested and obtained immunity for three prosecution witnesses who had, along with Goldstein, also assisted in petitioner's escape to Mexico. The trial court denied the request for immunity, determining that it had no authority to order immunity for a defense witness absent a request from the prosecution.

During the penalty phase portion of petitioner's trial, counsel again requested the court to grant immunity to Ms. Goldstein so she could testify in mitigation. Again, the trial court denied the request.

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1. That statute provides:

"In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction and that person shall comply with the order.

"After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

REASONS FOR GRANTING THE WRIT

A. Introduction

A defendant's primary interest in immunizing a defense witness is to obtain access to relevant exculpatory or mitigating evidence. The existence of California's immunity statute reflects the fact that in many cases, crucial evidence may only be obtained by calling witnesses who are themselves implicated in the charged crime. Kastigar v. United States, 406 U.S. 441, 446 (1972). A witness who faces possible prosecution will almost invariably assert his or her Fifth Amendment privilege against self-incrimination and refuse to testify. Where a defendant is prevented from introducing exculpatory evidence, his right to a fair trial and his right to present witnesses on his behalf are simultaneously affected. Accordingly, in preserving the right to present a defense, the courts have relied upon either the Sixth Amendment right to compulsory process or the Fifth Amendment guarantee of due process. Both theories acknowledge that denial of the right of an accused to present exculpatory evidence calls into question the ultimate integrity of the fact finding process.

B. The Sixth Amendment Compels the Grant of Judicial Immunity Sought in This Case

The Sixth Amendment to the United States Constitution guarantees to the accused the right to compulsory process for obtaining witnesses in his or her favor. The compulsory process clause places upon the state certain affirmative duties in securing the testimony of witnesses in the defendant's behalf. This right requires the state to apply its power and resources in

appropriate circumstances to ensure a fair trial. Johnson v. Johnson, 375 F.Supp. 872, 875 (S.D. Mich. 1974). The courts have generally agreed that the defendant's Sixth Amendment right of compulsory process must give way to a witness's invocation of his or her Fifth Amendment privilege against self-incrimination. E.g. Royal v. Maryland, 529 F.2d 1280, 1283 (4th Cir. 1976); United States v. Lacouture, 459 F.2d 1237, 1241 (5th Cir. 1974). However, a trial court's power to confer immunity renders it unnecessary to choose between these conflicting rights because the witness can be compelled to testify under conditions which preclude his or her words being used against him or her by the government in a criminal prosecution. The witness's Fifth Amendment right is thereby protected by a grant of immunity co-extensive with his privilege not to incriminate himself. Kastigar v. United States, supra.

This Sixth Amendment guarantee of compulsory process is necessary to a fair trial and due process of law. That is why earlier cases from this Court construed the compulsory process clause as providing for the right to present a defense. In Washington v. Texas, 388 U.S. 14 (1967), this Court voided a state rule that prevented defendants from calling their accomplices as defense witnesses. This Court balanced the state's interest in guarding against perjured testimony against the accused's interest in presenting exculpatory evidence. This Court concluded that the state's rule precluding accomplice testimony arbitrarily denied the defendant the right of compulsory process. (Id., at p. 19.) Similarly, in Chambers v.

Mississippi, 410 U.S. 284 (1973), this Court invalidated state evidentiary rules which (a) prevented a party from impeaching his own (hostile) witness, and (b) barred the defendant, through failure to recognize the declaration against penal interest as an exception to the hearsay rule, from introducing essential and reliable exculpatory evidence. The Court held that the state's right to fashion rules of evidence had to yield to the defendant's right to present evidence in his own defense. Because a denial of the right to present evidence calls into question the ultimate integrity of the fact-finding process, competing interests must be closely examined and weighed against each other. In Chambers, this Court found that the balance favored the defendant's right to present material evidence.

Thus, the two general themes of the Sixth Amendment cases are that (1) once a defendant demonstrates that a piece of evidence is reliable and material to the issue of his guilt or innocence, the defense need for the evidence outweighs a variety of general state interests in withholding the evidence; and (2) that when a defendant's Sixth Amendment rights are abridged by a prosecution or state policy, that policy must give way. Applied to the question of defense witness immunity, "such cases would mandate a balance of the defense need for evidence withheld by Fifth Amendment privilege claims against the general state interest in denying immunizing powers to defendants." Note, "The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity, 30 Stan.L.Rev. 1211, 1230 (1978).

C. The Due Process Clauses of the Fifth and Fourteenth Amendments Also Compel A Grant of Defense Witness Immunity Under the Circumstances of This Case

Analogously, the due process clauses of the Fifth and Fourteenth Amendments present further support authorizing judicial immunity for defense witnesses. In Brady v. Maryland, 373 U.S. 83 (1967), this Court established that due process requires the prosecution to disclose evidence in its possession which is favorable to the accused. In Brady, the prosecutor failed to disclose to the defense a statement in which the defendant's accomplice admitted killing the victim. This Court held the suppression of favorable and potentially exculpatory evidence from the defendant violated due process irrespective of the good or bad faith of the prosecution. (Id., at p. 87.)

A similar concept was applied in Roviaro v. United States, 353 U.S. 53 (1957), where the defendant sought to force the prosecutor to reveal the name of the informer whose statements had led to the defendant's arrest. The prosecutor had successfully argued at trial that the informer's identity was privileged. Although, this Court did not establish a concrete rule, it held that the duty to disclose depended upon a balancing test in each case, weighing the public interest in the flow of information against the individual's right to prepare a defense. (Id., at pp. 61-62.)

Similarly, in Jencks v. United States, 375 U.S. 657 (1957), this Court applied the identical rationale to hold that the defendant's need for documents with which to impeach

government witnesses outweighs the state's interest in confidentiality. The Court again balanced the defendant's need for evidence against general state interest in withholding certain categories of evidence. (Id., at pp. 670-672.)

Thus, the cases construing the requirements of the due process clauses of the Fifth and Fourteenth Amendments recognize that the essential task of a criminal trial is to search for the truth; and they accord great weight to the defendant's need for information. See Note, 67 Colum.L.Rev. 953 (1967).

The constitutional violation arising from denying a defense witness immunity and thereby preventing essential exculpatory testimony is the same as that found in the Chambers and Brady genre of cases. "Given the rationale of the suppression cases and the public's interest in ensuring testimony sufficient to provide a fair trial, it would be anomalous to hold that a defendant is denied a fair trial when he does not know of evidence of which the prosecutor is aware but does not reveal, while a defendant who knows of material evidence but cannot use that evidence without the assistance of the prosecutor is not thereby denied a fair trial." Note, 10 Harv.J. on Legislation 74, 76 (1972).

Several circuit courts have attempted, with varying results, to apply these principles to the issue of defense witness immunity.

In United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976), a witness for the defense was prepared to testify that she and not the defendant, was involved in the charged conspiracy to

sell hashish. Prior to her testimony, the prosecutor confronted the witness outside the court and threatened her with prosecution if she incriminated herself on the stand and thereby exonerated the defendant. She thereafter refused to answer a number of questions, and the defendant was convicted. The Circuit Court reversed the defendant's conviction, holding that the defendant was denied a fair trial in that he was deprived of his constitutional right to call witnesses in his defense by the actions of the prosecutor. Relying on Washington v. Texas, supra, the Court remanded the case with instructions to acquit the defendant unless the government offered use immunity to the witness. Thus, Morrison held that if a prosecutor prevents a witness from testifying for the defense by threatening prosecution, the court can order that the witness be granted use immunity and forced to testify. (Id., at pp. 226-229.)

The watershed case on this issue is Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980). In Smith, four young men robbed a man. During the course of the trial, three of the defendants sought to introduce the testimony of one Ernesto Sanchez, who had previously given a statement inculpating himself and exculpating three of the defendants. However, Sanchez claimed his Fifth Amendment privilege against self-incrimination and declined to make any significant substantive statement. The defense requested and was denied

immunity for Sanchez,[2] and the defendants appealed after being convicted.

The Court of Appeal remanded the case to the district court for a factual hearing on two theories under which the due process clause would mandate the granting of use immunity to witness Sanchez. First of all, the court held that:

> "If after an evidentiary hearing the district court finds that Sanchez' testimony would be relevant [footnote] and that the actions of the United States Attorney, as they bear upon Sanchez' refusal to testify and the immunity proffered by the Attorney General,[3] were taken with the deliberate intention of distorting the fact finding process, then the district court should enter a judgment of acquittal as to defendants Glen, Riera and Georges, unless the government consents to grant statutory use immunity to Sanchez. . . ." (Id., at p. 969.)

Secondly, the Court of Appeal held that the district court had "'inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense.'" Ibid., quoting United States v. Herman, 589 F.2d 1191, 1204 (3rd Cir. 1978). The Court set forth the procedural requirements which must be met in order for the judge to grant such immunity. Immunity must be sought in the district

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2. Sanchez was a juvenile, and not subject to prosecution by the United States Attorney's Office, which was prosecuting the Smith defendants. Instead, Sanchez was subject to the jurisdiction of the Attorney General of the Virgin Islands. The latter office had expressed its willingness to agree to a grant of statutory immunity to Sanchez, subject for reasons of comity to the agreement of the United States Attorney's Office. The United States Attorney refused to agree to that immunity, and thus the Virgin Islands Attorney General declined to seek it.

3. See footnote 2, supra.

court; the witness upon whom the defense seeks to confer immunity must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity. (Id., at p. 972.)

Following the Smith decision, the Courts of Appeal have been hesitant to rule that a trial court has inherent power to order immunity for defense witnesses absent a request by the prosecution. However, they have not completely ruled out the possibility of defense witness immunity where there is a showing of prosecutorial misconduct, where the prosecution is distorting the fact finding process or where the defendant is being deprived of a fair trial. (See United States v. Taylor, 728 F.2d 930 (7th Cir. 1984); United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987); United States v. Tindle, 808 F.2d. 319 (4th Cir. 1986); United States v. Davis, 623 F.2d 188, 192-193 (1st Cir. 1980); United States v. Capozzi, 883 F.2d 608 (8th Cir. 1989); Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987); United States v. Lord, 711 F.2d. 887 (9th Cir. 1983); Prantil v. California, 843 F.2d 314 (9th Cir. 1988).)

In the present case, while the California Supreme Court did not rule out entirely the need to vindicate a criminal defendant's right to compulsory process and a fair trial (People v. Hunter 49 Cal.3d at 973-974), it rejected petitioner's argument, stating that petitioner had failed to make the requisite showing of need as provided for in Government of Virgin Islands v. Smith, supra.

However the California Supreme Court failed to appreciate the significance of the prosecutor's actions in this case as depriving petitioner of his right to compulsory process and due process of law. Petitioner can not be faulted for the offer of proof presented to the trial court. At the pretrial hearing on the request for immunity for Ms. Goldstein, petitioner's counsel stated that he was prevented from fully investigating Goldstein's proposed testimony by the prosecution's decision not to offer her immunity, as well as by Goldstein's attorney's refusal to allow defense counsel to speak with her. Counsel could not fully develop Ms. Goldstein's proposed testimony for the trial court due the prosecution's refusal to grant her immunity and the fact that she therefore remained under the threat of prosecution.

Moreover, petitioner's request for judicial immunity was not denied by the trial court because petitioner failed to meet his burden of proof. The motion was denied because the trial court believed it was without any authority to confer immunity upon a defense witness. (RT 5741-5747.) If the Sixth and Fourteenth Amendments require a state trial court to grant immunity to a defense witness over prosecution objections in appropriate circumstances, then the trial court was wrong in that belief. If the trial judge had realized that he had that authority, he would have engaged in a fuller inquiry, thus enabling petitioner's counsel to better articulate the factors which, under the Smith criteria, would have required a grant of use immunity to Judith Goldstein.

The California Supreme Court concluded that Ms. Goldstein's testimony was, at best, cumulative of the testimony of petitioner's sister and other defense witnesses who testified about the abuse petitioner suffered at the hands of his father. Thus, the Court held Goldstein's testimony to be not essential to petitioner's case. (People v. Hunter 49 Cal.3d at 974.) This conclusion is completely incorrect because no other witness provided the same evidence that Goldstein could potentially have provided. The sister's testimony about her conversation with petitioner the day after the killing did not provide any insight into his state of mind on the day of the killing. She testified that petitioner had told her that he was feeling depressed from having attended a funeral the previous day. That testimony did not show what effect that funeral had on petitioner with regard to his emotions about his father. It was the relationship between the funeral services and his feelings about his own mother's death and his father's life which triggered the homicides. The sister's testimony was of no assistance with this defense.

Similarly, the California Supreme Court's reliance upon the psychiatric testimony as to petitioner's state of mind on the day of the homicides is unavailing. (People v. Hunter 49 Cal.3d at 974.) The psychiatrist's testimony about petitioner's mental state on the day of the homicides was based upon petitioner's own statements, and the jury could only consider those statements to the psychiatrist as a foundation for the doctor's opinions and

not for their truth.[4] The jury was left simply with doctors' opinions and no underlying facts, such as Goldstein could have provided, to support petitioner's mental state defense.

Also, given the general public skepticism about psychiatric evidence, testimony from a live witness as to concrete events is far more persuasive to a jury than the testimony of a psychiatrist. Accordingly, Ms. Goldstein's testimony was not cumulative and the trial court's refusal to grant her use immunity deprived petitioner of his right to present a complete defense. (Crane v. Kentucky, 476 U.S. 683 [1986].)

The California Supreme Court also concluded that there was no evidence that the prosecution intentionally withheld immunity from Goldstein solely to assure the exclusion of her testimony. (People v. Hunter 49 Cal.3d at 975.) Petitioner submits that this is a very disingenuous reading of the record. The record more than adequately demonstrates that the prosecution intentionally interfered with petitioner's constitutional right to present evidence on his behalf in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

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4. The jury was given the following instruction:

> "There has been admitted in evidence the testimony of a medical expert of statements made to him by the defendant in the course of an examination of the defendant which was made for the purpose of diagnosis. The testimony of such statements may be considered by you only for the limited purpose of showing the information upon which the medical expert based his opinion. Such testimony is not to be considered by you as evidence of the truth of the facts disclosed by defendant's statements." (RT 6280.)

The prosecution never offered any reason for not extending immunity to Ms. Goldstein even though it had granted immunity to three other similarly situated witnesses.[5] The prosecution had all of the evidence necessary to prosecute Ms. Goldstein for the charged crime of being an accessory after the fact. The prosecution's strenuous objection to a grant of immunity for Ms. Goldstein is indicative of how important she was to the defense and how potentially damaging to the prosecution. Finally, after successfully thwarting petitioner's attempt to present to the jury Goldstein's testimony regarding his state of mind at the funeral, the prosecutor told the jury during his closing argument that there was no direct evidence in the record that petitioner's alleged statement at the funeral was overheard by anyone. (RT 6140-6143.)[6] The fact that the prosecutor made

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5. Compare the actions of the United States Attorney in Government of Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980), discussed in footnote 2, supra, and accompanying text.

6. The prosecutor argued to the jury:

"Ccincidentally no one heard the comment that defense counsel referred to with regard to:

'The good die, and the bad live on.'"

Following an objection by defense counsel in which he argued that this was an unfair argument because the prosecutor had prevented direct testimony of this statement by refusing to grant immunity to Goldstein, the prosecutor continued:

"I don't know any direct evidence in the record indicating that that statement was overheard by anyone at all. In fact the question was asked of Carol Lang [the daughter of the woman for which the funeral was held] whether or not she overheard it, 'Didn't you hear it?' And she said: 'I don't remember it.' Counsel then asked could it have been said. And she said, 'I guess it could have been but I don't remember it.'"

(continued . . .)

such an argument further supports petitioner's claim of intentional prosecutorial interference which deprived appellant of his fundamental right to due process and compulsory process. (United States v. Smith, 478 F.2d 976, 979 [D.C. Cir. 1973]; United States v. MacCloskey, 582 F.2d 468 [9th Cir. 1982]; United States v. Henrickson, 564 F.2d 197 [5th Cir. 1977].) The record aptly supports the conclusion that there was no other reason for not extending a grant of immunity to Goldstein except to preclude her from providing relevant information for the defense.

Similarly, the arrangement between the prosecutor and Goldstein's attorney, with the trial court's sanction, whereby the prosecution of Goldstein was repeatedly continued, over petitioner's objection, until petitioner's trial could be completed, is significant evidence of the prosecutor's intentional interference with petitioner's constitutional right to present all evidence in his defense. Those continuances guaranteed that Judith Goldstein would never be in a position to testify in petitioner's favor without increasing her risk of imprisonment, both because of self-incrimination and because of her potential thwarting of the prosecutor's goal of putting Michael Hunter into the gas chamber.

Finally, this case presents a situation never before considered by the other decisions on defense witness immunity. This case presents the additional question of whether a trial

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(. . . continued)

"If that is in the record so be it, I stand corrected, but I don't believe it is." (RT 6040-6043.)

court must grant defense witnesses immunity in appropriate circumstances in a capital case in order that they may present relevant evidence in mitigation. In Lockett v. Ohio, 438 U.S. 586 (1978), this Court held that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering any aspect of the defendant's character or record and any such of the circumstances of the offense that the accused offers as a basis for a sentence less than death. (Id., at p. 604; Green v. Georgia, 442 U.S. 95 (1979); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1.) The trial court's failure to grant immunity to Ms. Goldstein when asked to do so at the penalty phase deprived petitioner of his constitutional right to present all relevant mitigating evidence.

Petitioner has already discussed the strong mitigating nature of the evidence Ms. Goldstein would have provided. Her testimony about petitioner's mental state on the day of the homicide went directly to factors about the circumstances of the offense that provided a basis for a sentence less than death. Her testimony was not cumulative because it would have been relevant to penalty and not just the question of guilt. Since, at the penalty phase, the jury was allowed to consider all of the evidence presented during the guilt phase portion of the trial, the district attorney's improper comment about no one overhearing petitioner's statement at the funeral effectively removed even this mitigating evidence from the jury's consideration at the penalty phase. Thus, once again the jury was left with doctors'

opinions and no underlying facts such as Goldstein could have provided to support appellant's mental state defense and provide the jury with a reason to spare his life.

Furthermore, Goldstein had been the person closest to petitioner within the year before the homicides. She alone could have provided significant information about him and his life. No other witness did nor was any other witness able to provide the jury with compelling reasons why petitioner should not be condemned to death.

CONCLUSION

Under Rule 17.1(c) of the Rules of this Court, the California Supreme Court has decided an important question of federal law which should be settled by this Court. Furthermore, the manner in which this important federal constitutional question was decided by the state court is in conflict with applicable decisions of this Court, specifically, Lockett v. Ohio, supra, Green v. Georgia, supra, Eddings v. Oklahoma, supra, and Skipper v. South Carolina, supra.

Wherefore, petitioner prays that a writ of certiorari issue to the Supreme Court of the State of California.

Dated this 29th day of May, 1990, at Sacramento, California.

Respectfully submitted,

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APPENDIX A

[No. S004613. Crim. No. 23630. Dec. 7, 1989.]

THE PEOPLE, Plaintiff and Respondent, v.
MICHAEL WAYNE HUNTER, Defendant and Appellant.

SUMMARY

Defendant was found guilty of the murder of his father and stepmother (Pen. Code, § 187). The jury also found true the allegation that he had personally used a firearm in the commission of the murder (Pen. Code, § 12022.5), and the special circumstance allegation that he was convicted of more than one murder (Pen. Code, § 190.2, subd. (a)(3)). The death penalty was imposed. (Superior Court of San Mateo County, No. C-1107, Robert E. Carey, Judge.)

The Supreme Court affirmed. It held that the trial court did not commit reversible error by allowing the prosecution to discover a defense investigator's reports pursuant to Pen. Code, § 1102.5, even though § 1102.5 was found invalid following defendant's trial. The court also held that the trial court did not err, in either the guilt or penalty phase, in denying defendant's request to grant judicial use immunity to defendant's girlfriend so as to overcome her privilege against self-incrimination. Further, the court held, the trial court did not impermissibly deprive the jury of the opportunity to consider and deliberate upon possible lesser offenses by instructing it that it must unanimously agree that defendant was not guilty of first degree murder before it could find defendant guilty or not guilty of second degree murder, and that it must unanimously agree that defendant was not guilty of second degree murder before it could find him guilty or not guilty of voluntary or involuntary manslaughter. The court held that the trial court did not commit reversible error in failing to give an instruction requested by defendant stating that the testimony of immunized witnesses must be viewed with suspicion and examined with greater care and caution than the testimony of an ordinary witness. Further, any error in giving an instruction, at defendant's request, on the doctrine of transferred intent was harmless.

In the penalty phase of the trial, the court held, the trial court did not commit reversible error in its responses to a jury note posing questions concerning the possibility of parole, and the trial court's instruction to the jury in the language of Pen. Code, § 190.3 (if aggravating circumstances outweigh mitigating circumstances, death sentence must be imposed), did not constitute reversible error. Finally, the court held, the prosecutor's comments during closing argument indicating that defendant's statement in allocution had not been subject to cross-examination did not constitute prejudicial error, and the trial court's instruction that the jury should consider whether or not the offense was committed while defendant was under the influence of extreme mental or emotional disturbance did not improperly indicate that any lesser disturbance would not be a possible mitigating factor. (Opinion by Kaufman, J., with Lucas, C. J., Mosk, Broussard, Panelli, Eagleson and Kennard, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Homicide § 107—Appeal—Harmless Error—Discovery of Defense Investigator's Reports.**—In a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the trial court did not commit reversible error by allowing the prosecution to discover a defense investigator's reports pursuant to Pen. Code, § 1102.5. Although the California Supreme Court found § 1102.5 to be invalid following defendant's trial, even assuming that decision to be applicable to defendant's case any error was harmless beyond a reasonable doubt. The prosecutor used one report to cross-examine a witness regarding an incident in which she took defendant in late at night and promised not to tell defendant's mother he had stolen a motorcycle; however, he did not use the incident to impeach the witness's credibility, nor did it have that effect. The prosecutor's reference to a letter written by defendant to another witness in which defendant stated that he was sane was similarly nonprejudicial; defendant never claimed to be other than sane.

(2a-2c) **Witnesses § 6—Duty to Testify—Privilege Against Self-incrimination; Claim and Waiver—Use Immunity—Trial Court's Power to Confer.**—In a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the trial court did not err in denying defendant's request to grant judicial use immunity to his girlfriend so as to overcome the girlfriend's claim of her privilege against self-incrimination, notwithstanding defendant's contention that such denial violated his right to compulsory process under U.S. Const., 6th Amend., and his right to due process under U.S.

Const., 5th Amend. A trial court does not have the inherent power in such circumstances to confer use immunity upon a witness called by the defense. Even assuming that a grant of such immunity could be sometimes necessary to vindicate a defendant's rights, the girlfriend's testimony (which would have been that defendant was depressed at the time of the offenses as a result of attending a funeral) was not clearly exculpatory or essential and was cumulative of the testimony of other defense witnesses. There was no evidence that the prosecutor intentionally refused to grant immunity to a key defense witness in order to suppress essential, noncumulative exculpatory evidence.

(3) **Witnesses § 6—Duty to Testify—Privilege Against Self-incrimination; Claim and Waiver—Transactional Immunity.**—The granting of transactional immunity is conditioned upon a written request by the prosecutor that the witness be compelled to answer.

(4) **Witnesses § 6—Duty to Testify—Privilege Against Self-incrimination; Claim and Waiver—Immunity—Distinctions.**—Use immunity protects a witness only against the actual use of his compelled testimony, as well as the use of evidence derived therefrom. Transactional immunity protects the witness against later prosecutions related to matters about which he testifies.

[See Am.Jur.2d, Witnesses, § 59.]

(5) **Witnesses § 6—Duty to Testify—Privilege Against Self-incrimination; Claim and Waiver—Immunity—Prosecutor's Duty.**—The prosecutor's duty is to administer the immunity power evenhandedly, with a view to ascertaining the truth, and not as a partisan engaged in a legal game.

(6) **Criminal Law § 213—Trial—Continuance—Where Accessory Being Separately Prosecuted.**—In a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the trial court did not err in denying defendant's request to continue his case until the conclusion of the trial of his girlfriend, who was being separately prosecuted as an accessary after the fact, where her testimony (which would have been that defendant was depressed at the time of the offense as a result of attending a funeral) was not essential, clearly exculpatory, nor noncumulative.

(7a, 7b) **Criminal Law § 250—Trial—Instructions—Lesser Included Offenses—Order of Deliberation and Rendering of Verdicts—Discretion of Trial Court.**—In a prosecution for first degree murder in which

defendant was accused of killing his father and stepmother, the trial court did not impermissibly deprive the jury of the opportunity to consider and deliberate upon possible lesser offenses, where it instructed the jury that it must unanimously agree that defendant was not guilty of first degree murder before it could find defendant guilty or not guilty of second degree murder, and that it must unanimously agree that defendant was not guilty of second degree murder before it could find him guilty or not guilty of voluntary or involuntary manslaughter. There was nothing in the instruction or in the record of the jury's deliberation to suggest that the jury believed it must return a verdict on the greater offense before it could consider or discuss the lesser included offenses. The trial court has broad discretion to forestall an anticipated deadlock or to assist the jury in moving beyond an actually threatened deadlock by directing the jury at least as to the sequence in which verdicts will have to be ultimately rendered.

(8) **Criminal Law § 250—Trial—Instructions—Lesser Included Offenses—Order of Deliberation and Rendering of Verdicts.**—The trial court may instruct the jury that it may not return a verdict on the lesser offense unless it has agreed beyond a reasonable doubt that the defendant is not guilty of the greater crime charged; however, the jury is not prohibited from considering or discussing the lesser offenses before returning a verdict on the greater offense.

(9) **Criminal Law § 244—Trial—Instructions—Accomplice's Testimony—Immunized Witnesses.**—Trial courts are required, under appropriate circumstances, to give special cautionary instructions concerning accomplice testimony; generally, however, an interested witness's entitlement to full credit under Evid. Code, § 411, is a matter for the trier of fact. Thus, in a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the trial court did not commit reversible error in failing to give an instruction requested by defendant stating that the testimony of immunized witnesses must be viewed with suspicion and examined with greater care and caution than the testimony of an ordinary witness. The trial court's general instruction on witness credibility coupled with its modified instruction specifically directing the jury to determine whether the immunized witness's credibility had been affected by the immunity adequately informed the jury of the necessity to weigh the motives of the immunized witnesses.

(10) **Homicide § 110—Appeal—Harmless Error—Instructions—Transferred Intent.**—In a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, any error

in giving an instruction, at defendant's request, on the doctrine of transferred intent was harmless, notwithstanding the contention that the instruction might have prejudicially misled the jury to transfer findings of intent, premeditation, and deliberation with respect to the killing of the father to the killing of the stepmother. Even ignoring the doctrine of invited error and assuming the giving of the instruction was error, no prejudice could conceivably have resulted, since the prosecution's case was premised entirely on the theory that defendant had committed two premeditated first degree murders, and the physical evidence strongly supported the theory that both killings were intentional.

(11) **Homicide § 100—Punishment—Denial of Immunity to Witness for Defense.**—In the penalty phase of a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the trial court did not err in denying defendant's request, which was previously denied at the guilt phase, that his girlfriend be granted judicial use immunity so as to be able to testify that defendant was depressed at the time the offenses were committed. A defendant is entitled under U.S. Const., 8th Amend., and U.S. Const., 14th Amend., to present at the penalty phase of trial all relevant mitigating evidence relating to his character and background or the circumstances of the offense. However, even assuming that the trial court had the authority to confer use immunity on the girlfriend, there was nothing in the record to demonstrate that its decision denied defendant highly relevant mitigating evidence. The jury had already been presented evidence of defendant's purported depression, and defendant had expressly indicated in his statement in allocution that his attendance at a funeral had made him feel that it was unfair that his father was still alive.

(12) **Homicide § 110—Appeal—Harmless Error—Instructions—Possibility of Parole.**—In the penalty phase of a prosecution for first degree murder, the trial court did not commit reversible error in its responses to a jury note posing questions concerning the possibility of parole. The court correctly admonished the jury that in determining defendant's sentence it was not to consider the Governor's power to commute or modify sentences, including the power to grant parole, that it would violate the jury's duty if it were to fix the sentence at death out of the concern for possible future actions by the Governor or the parole board, and that it was not to consider any matters not properly before it by the evidence or instructions. Such instructions are adequate to advise the jury as to its proper sentencing considerations. The court did not err prejudicially either in denying defense counsel's

request to reopen the penalty phase to show that no life prisoner had received a commutation in recent memory, or in denying defense counsel's request that the court question the jury concerning a statement in its note that the jury knew of cases in which persons convicted of life sentences without possibility of parole were out on the streets.

[See Cal.Jur.3d (Rev), Criminal Law, § 3344.]

(13a, 13b) **Homicide § 110—Appeal—Harmless Error—Instructions—Penalty Phase—Aggravating and Mitigating Factors—Weighing Process.**—In the penalty phase of a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the court's instruction to the jury in the language of Pen. Code, § 190.3 (if aggravating circumstances outweigh mitigating circumstances, death sentence must be imposed), did not constitute reversible error. There was no possibility of jury confusion concerning its responsibility to weigh, rather than count, the applicable factors, since the trial court correctly informed the jury as to how it was going to undertake the weighing process. The jury was not misled by the prosecutor's exhortation to apply the law no matter how distasteful, and its suggestion that the task was a simple one, just a balancing test; viewed in context, these remarks were meant to tell the jury that their decision was anything but simple and that they must abide by their oaths, and remain faithful to their assurances during voir dire that they could put aside their personal feelings about the death penalty.

(14) **Homicide § 110—Appeal—Harmless and Reversible Error—Instructions—Penalty Phase—Aggravating and Mitigating Factors—Weighing Process—Test on Review.**—On appeal of convictions in cases tried before a California Supreme Court decision holding that an instruction in the language of Pen. Code, § 190.3 (if aggravating circumstances outweigh mitigating circumstances, death sentence must be imposed), had the potential of misleading the jury as to the scope of its sentencing discretion, the Supreme Court examines the entire record to determine whether, in context, the sentencer may have been misled to the defendant's prejudice about the scope of its sentencing discretion.

(15) **Homicide § 101—Punishment—Death Penalty—Instructions—Aggravating and Mitigating Factors—Emotional Disturbance.**—In the penalty phase of a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the trial court's instruction that the jury could consider whether or not the offense was committed while defendant was under the influence of

extreme mental or emotional disturbance did not improperly indicate that any lesser disturbance would not be a possible mitigating factor. The trial court also instructed the jury, under Pen. Code, § 190.3, subd. (k), that it could consider any other circumstance extenuating the gravity of the crime. Further, the court and counsel focused specifically on the evidence of emotional disturbance, and the court instructed the jury, at defendant's request, that in addition to the statutory mitigating factors, it could consider as an additional mitigating factor whether defendant had been subjected to physical abuse or cruelty during his formative years.

(16) **Criminal Law § 451—Prosecutor—Closing Argument—Comment on Defendant's Statement in Allocution.**—In the penalty phase of a prosecution for first degree murder in which defendant was accused of killing his father and stepmother, the prosecutor's comments during closing argument indicating that defense's statement in allocution had not been subject to cross-examination did not constitute prejudicial error. A defendant does not have the right to address the sentence without being subject to cross-examination in capital cases, and thus the prosecutor could not be faulted for calling attention to the fact that defendant's statement had not been subject to cross-examination.

(17) **Homicide § 101—Punishment—Death Penalty—Instructions—Aggravating and Mitigating Factors.**—In the penalty phase of a prosecution for murder in which defendant was accused of killing his father and stepmother, the trial court's instructions did not improperly limit the jury's consideration of defendant's mitigating background and character evidence, where the court instructed the jury that it could consider any other circumstance that extenuated the gravity of the crime, including but not limited to defendant's character, background, history, mental condition, and physical condition on record, and where the prosecutor in his argument addressed the potentially mitigating evidence and defense counsel stressed its mitigating effect.

COUNSEL

Frank O. Bell, Jr., and Harvey R. Zall, State Public Defenders, under appointment by the Supreme Court, Roy M. Dahlberg, Deputy State Public Defender, and Cynthia A. Thomas for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, John H. Sugiyama, Assistant Attorney General, Dane R. Gillette and Gerald A. Engler, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KAUFMAN, J.—Michael Wayne Hunter appeals (Pen. Code, § 1239, subd. (b))[1] from a judgment of death following his conviction of the murders (§ 187) of Jay and Ruth Hunter. The jury also found true the allegation that defendant had personally used a firearm in the commission of the murders (§ 12022.5), and the special circumstance allegation that defendant was convicted, in this proceeding, of more than one murder. (§ 190.2, subd. (a)(3).) Having found no error warranting reversal of the guilt or penalty phase verdicts, we affirm the judgment in its entirety.

I.

FACTS

A. *Prosecution Case*

On the evening of December 28, 1981, Jay and Ruth Hunter, defendant's father and stepmother, were shot to death in the bedroom of their home in Pacifica. The events surrounding their death, as revealed through the evidence and testimony at trial, were as follows.

In November 1981, about a month before the homicides, defendant told his friend, Thomas Henkemeyer, of plans to kill his father and stepmother. According to Henkemeyer, defendant laid out several scenarios for possible alibis, including taking out a hiking permit in Yosemite National Park and then returning to commit the murders, or going down to San Diego where friends would purportedly provide an alibi. Based on earlier conversations with defendant, Henkemeyer concluded that defendant's motive for the planned killings was to take "revenge" for a number of perceived grievances; these included an incident in which his stepmother had reported defendant for breaking into his parents' home while they were away on vacation, and his stepmother's handling of his natural mother's will, which defendant believed resulted in his being cheated of his inheritance. Defendant also discussed possible methods of transporting and concealing a rifle or shotgun.

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[1] All statutory references are to the Penal Code unless otherwise indicated.

Several weeks later, between December 12th and 14th, defendant brought a shotgun and shells to Henkemeyer's residence in Sacramento. Defendant told Henkemeyer that he planned to use the shotgun to kill his parents during the spring or summer of 1982. Defendant left the shotgun and shells with Henkemeyer.

Shortly thereafter, on December 20th, Henkemeyer left Sacramento to spend the Christmas holidays with his family in Minnesota. Before he left, he drove his car, a brown Toyota Corolla, to defendant's house in Mountain View for safekeeping. He gave defendant the keys to the car and the keys to his residence in Sacramento.

About a week later, on the evening of December 28th, a neighbor of Jay and Ruth Hunter was awakened by a loud "bang or shot" from the direction of the Hunter residence. He heard four more shots in quick succession. On or about the same evening in late December, Philip Eldred was walking two dogs a short distance from the Hunter residence when he encountered a man wearing a leather jacket and a motorcycle helmet. For no apparent reason the man told Eldred to leave the area. Eldred refused. In response, the man pointed a long object (which Eldred then realized was a shotgun) at Eldred's face, kicked him in the thigh and retreated behind a cyclone fence several feet away. He then fired a shotgun blast in Eldred's direction, entered a small, burgundy-colored car parked nearby, and drove away. Eldred stated that the man appeared to be in his early 20's and of medium build. Defendant was 23 at the time of the offenses.

Later the same evening, defendant's roommate, Jeffrey Hansen, was watching television when defendant walked through the front door. According to Hansen, defendant immediately showed him his left arm, which was cut between the wrist and elbow, and explained that he had tripped on the front porch, dropped a six-pack of beer and cut himself.

The bodies of Jay and Ruth Hunter were discovered the following day, December 29, 1981, after the police were alerted that the front door of the residence was wide open and a window on the side of the door was broken out. The police found both bodies in the master bedroom. The body of Jay Hunter was on the bed; that of Ruth Hunter was lying against the far wall, on top of the telephone receiver. Eight expended shotgun casings were found on the floor. Autopsies revealed that Ruth Hunter had died of two shotgun wounds to the head, either of which was sufficient to cause death. Jay Hunter had suffered four shotgun wounds. One shot to the upper chest that had apparently caused death was fired from a distance. Three other shots, to the neck, abdomen and left knee, had been fired from much closer range and were consistent with having been inflicted where the victim lay.

During the next several days, Henkemeyer, still in Minnesota visiting his family, received two telephone calls from defendant. In the first call defendant told Henkemeyer that he had killed his mother and father and was trying to decide what to do. During the second call, a day or two later, defendant said that he had spoken with a lawyer and was preparing to leave the country. He also indicated that he had been seen by a stranger after the killings but doubted that an identification could be made because he was wearing a helmet. When Henkemeyer returned home to Sacramento on New Year's Day, he found that the shotgun defendant had left was missing.

Around the same time period defendant also spoke with his friend Jefferson Schar. Defendant told Schar that his parents had been killed and that he had "a lot to do with it." Defendant told Schar, however, that he had merely accompanied another, unidentified man who had actually committed the murders. Defendant described to Schar the events immediately preceding the shooting. He said that he had entered the house, awakened his father and told him that his entry proved he could "get to [him] at any time." His father responded: "You don't have the balls enough to do anything of that nature." Defendant became angered and told the unidentified gunman to "go ahead and shoot him." The gunman complied. His mother awakened, said, "No, Mike, don't," and the gunman shot her too.

The day after his conversation with Schar, defendant told Henkemeyer that he was trying to leave the country and asked him to sell some of his belongings. At defendant's request, Schar drove defendant to San Jose airport. On the way, defendant stopped at a barbershop and had his beard and moustache shaved off. Defendant asked Schar to obtain a phony birth certificate for him under the name John Dunne. At the airport defendant purchased a ticket to San Diego under a false name. While waiting for the flight, defendant again told Schar that he was involved in the killings but was not the shooter. He explained that after the incident he had disposed of the murder weapon by breaking it into pieces and throwing it into the bay. Defendant said that he planned to contact a friend named Jeffrey Luther in San Diego and instructed Schar to forward the phony birth certificate to him there.

Luther received a telephone call from defendant on January 3, 1982. The two arranged to meet at a restaurant in San Ysidro, near the Mexican border. At the restaurant, defendant told Luther that he was "wanted for murder" and explained the circumstances of the shootings. Defendant said that he had entered his parents home carrying a shotgun and wearing a motorcycle helmet. He confronted his father and threatened to shoot him. His father responded, "[Y]ou don't have the balls." In response, defendant told Luther, he "pumped four slugs into him."

Following the conversation in San Ysidro, Luther saw defendant again in a hotel in Las Playas, Mexico. Luther agreed to purchase some items for defendant. After the meeting in Mexico, however, Luther contacted the police, who advised him not to meet defendant again in Mexico but rather to lure him back across the border. Accordingly, Luther arranged to meet defendant at the restaurant in San Ysidro where they had earlier met. When defendant appeared at the restaurant, he was arrested.

Following his arrest, defendant was incarcerated in the San Mateo County jail. Joseph Lauricella, defendant's cellmate, testified that defendant gave him a number of descriptions of how the murders occurred. Defendant also told him that he had been turned in by a Navy buddy (Luther) and offered Lauricella $1,000 to have him killed.

Even as defendant was fleeing to Mexico, the police investigation into the killings was focusing on defendant as the prime suspect. A search of defendant's house and two vehicles uncovered a cleaning bill for a leather jacket which stated "pre-spot for blood." The police also found a shirt with blood on it and a black motorcycle helmet. Glass fragments found inside a pair of defendant's socks and gloves matched glass fragments from the broken window of the Hunter residence.

Finally, a number of prosecution witnesses testified about defendant's troubled relationship with his father and stepmother. Defendant's father and natural mother, June Hunter, had separated and divorced in 1973. June Hunter died of cancer in 1979. Following the divorce, Jay Hunter married Ruth Chatburn Hunter. Defendant's sister, who was the administrator of her mother's estate, asked Ruth, a lawyer, to handle the probate. Ruth eventually removed herself from the case, however, because of an argument with defendant sometime in 1980. Defendant felt that he had been cheated of his share of the estate. According to a former roommate of defendant, the dispute became so acrimonious that it caused a rupture of all contacts between defendant and his father.

A second source of animosity between defendant and his parents stemmed from an incident in October 1981, when defendant entered his parents' home in Pacifica while they were on vacation. Mrs. Hunter reported the burglary to the police, who questioned defendant. Mrs. Hunter also apparently searched defendant's residence in Mountain View while defendant was absent. Defendant became angered and upset with his stepmother as a result, and told his roommate that if he went to jail for burglary his father "would be dead."

The acrimony was apparently mutual. Only a month before the murders, in late November 1981, defendant's father instructed his attorney to delete

from his will any inheritance for defendant. Mr. Hunter indicated that the matter was not urgent, however, and could wait until the new year. At the time of the murders in late December, the will had not been changed.

B. *Defense Case*

The defense presented extensive testimony in an attempt to show that defendant's intense hatred of his father, stemming from emotional and physical abuse he had received as a child, obscured his reasoning to the extent that he was unable to harbor malice or deliberate and premeditate the crimes.

Four former neighbors and family friends testified about defendant's relationship with his father. Joseph and Maxine Sonia DeHazes were friends and neighbors of the Hunters for many years and both testified that Jay Hunter was abusive toward defendant. Mr. DeHazes testified that defendant had been verbally abused by his father since he was an infant. Mrs. DeHazes stated that she observed a clear difference between Jay Hunter's relationship with his daughters and his sons. Mr. Hunter never displayed any affection toward defendant and often hit him. She recalled one incident in which he hit defendant so hard that Mr. DeHazes had to intervene. She further recalled that as defendant grew older the physical abuse turned to verbal abuse. Mrs. DeHazes believed that Mr. Hunter also abused his first wife; she frequently observed June to have bruises and on one occasion saw her with black eyes. Two other former neighbors of the Hunters felt that Jay was very harsh toward defendant and used excessive force.

Defendant's brother, Tom, and his sister, Mary, also testified about defendant's relationship with his father. Tom recalled that his father had inflicted corporal punishment on defendant on many occasions when he was a youth, and was also abusive toward his mother. Tom described his father as an abusive drinker, possibly an alcoholic, who, when drunk, often hit defendant.

Mary, who testified for both the defense and the prosecution, stated she had never witnessed any beatings of defendant by her father. She recalled speaking with defendant on December 29, 1981, the day after the murders, and that defendant said he had been to a funeral the previous day and was feeling depressed as a result. Carol Lange, a roommate of defendant's girlfriend Judith Goldstein, confirmed that defendant attended her mother's funeral on the morning of December 28, 1981, the day of the murders.

Two psychiatrists also testified on defendant's behalf. Dr. George Wilkinson treated defendant while he was incarcerated in the San Mateo County

jail. Dr. Wilkinson stated that he had not observed any evidence of psychosis in defendant, but diagnosed him as clinically depressed; he was unable to determine whether the depression predated defendant's incarceration. Dr. Donald Lunde testified that he had examined defendant on four occasions and concluded that at the time of the killings defendant's mental state limited his ability to premeditate and deliberate, and that it was "unlikely" defendant had premeditated the murders. Dr. Lunde did not detect any evidence of schizophrenia or lack of capacity to obey the law, but believed there was "some diminution of his abilities or his capacity to have harbored malice at that time."

C. *Penalty Phase Evidence*

The prosecutor presented no additional evidence during the penalty portion of the trial.

The defense presented further testimony from defendant's brother, Tom, who asked the jury to spare his brother's life because he felt that there was hope of his "becoming a Christian." Tom stated that there had been enough death in the family, and that killing his brother would do nothing more than hurt himself and his sisters.

Additionally, defendant presented a lengthy unsworn oral statement in allocution on his own behalf which was not subject to cross-examination by the prosecutor. In this statement defendant admitted committing several minor juvenile offenses. He stated that he had joined the Navy when he was 17 and described his naval training and experience. He further explained that he had become disenchanted with the Navy when his superior officers allegedly delayed telling him of his mother's death. After that his performance in the Navy deteriorated and he was given a dishonorable discharge that was later upgraded to an honorable discharge.

Defendant stated that his relationship with his father had not been good for several months preceding the killings. His father had become enraged when he learned that defendant had been invited to Tom's high school graduation in June 1981 and, as a result, his father refused to attend.

Defendant stated that he had attended a funeral for Carol Lange's mother on the day of the murders and while there had started to think of his own mother, who died of cancer just as she was getting her life in order. He began to feel it was unfair that she was dead and his father was alive. He admitted responsibility for the murders but denied that they were committed for money. He acknowledged there was no justification, especially for the murder of his stepmother, whom he did not remember being in the

room. Defendant stated that he had been receiving counseling and had made steps toward becoming a different person. He felt that, with his Naval training and continued counseling, he could contribute to society.

II.

DISCUSSION

A. *Guilt Phase Issues*

1. *Prosecutorial Discovery*

(1) Defendant contends that the trial court committed reversible error by allowing the prosecution to discover certain of the defense investigator's reports pursuant to section 1102.5.[2] The contention is not meritorious.

In *In re Misener* (1985) 38 Cal.3d 543 [213 Cal.Rptr. 569, 698 P.2d 637], decided after the trial of this case, a majority of this court invalidated section 1102.5 on the ground that it contravened the state constitutional privilege against self-incrimination. (*Id.*, at p. 558.) Defendant asserts that *Misener* is retroactive and compels reversal. The Attorney General counters that *Misener* was incorrectly decided and should be overruled. We need not address the merits of *Misener* here, however, for our review of the record reveals that any error under that decision was harmless beyond a reasonable doubt.

The district attorney first requested discovery of a report the defense was using to cross-examine a prosecution witness. The court denied the request, ruling that section 1102.5 permitted discovery only of defense witness statements.

Later, during the testimony of the third defense witness, Joseph DeHazes, the district attorney requested and was permitted discovery of a nine-page report of a defense interview with the witness and his wife, Maxine Sonia DeHazes. The district attorney subsequently obtained written reports of the defense investigator's interviews with two additional defense

[2]Section 1102.5, enacted in 1982, provides in relevant part that "[u]pon motion, the prosecution shall be entitled to obtain from the defendant or his or her counsel, all statements, oral or however preserved, by any defense witness other than the defendant, after that witness has testified on direct examination at trial. At the request of the defendant or his or her counsel, the court shall review the statement in camera and limit discovery to those matters within the scope of the direct testimony of the witness."

witnesses, Carol Huelskamp and Tom Hunter, defendant's younger brother.[3]

Defendant bases his claim of prejudicial error on the prosecutor's use of the reports to cross-examine the witnesses as follows: During his cross-examination of Mrs. DeHazes, the prosecutor asked about an incident, related in the defense investigator's report, in which defendant appeared at Mrs. DeHazes's door late one night pleading to be let in. Defendant explained to her that the police were chasing him for stealing a motorcycle. Mrs. DeHazes let him stay for a while, gave him something to eat and promised not to tell his mother.

Defendant contends that the revelation of this incident damaged Mrs. DeHazes's credibility because it portrayed her as an "accessory to a crime." The contention is without merit. The prosecutor did not use the incident to impeach Mrs. DeHazes's credibility nor did it have that effect. Indeed, if anything the incident bolstered Mrs. DeHazes's testimony that defendant was subject to excessive physical and verbal discipline at home, and had good reason to fear his father's reaction should he learn of the incident. Furthermore, even if Mrs. DeHazes's testimony was somehow impeached, the jury was left to consider the testimony of numerous other witnesses who had offered similar testimony that defendant was abused by his father. We conclude there is no reasonable possibility that the prosecutor's reference to the incident prejudiced defendant.

Defendant also makes several claims of prejudicial error flowing from the prosecutor's use of a defense investigator's report to cross-examine Tom Hunter. First, the prosecutor asked Tom about a statement in the report to the effect that defendant was "extremely manipulative and habitually told lies . . . ." Tom denied making the statement. Moreover, in light of the record as a whole we are confident that the statement's admission was harmless. Tom had already admitted under cross-examination—*before* the prosecutor's reference to his statement in the defense report—that he knew of instances in which defendant had lied and that "part of [defendant's] personality [was] to manipulate." In addition, defendant's sister, Mary Hunter Bizzarri, had previously testified that defendant was "manipulative"

[3]The record is unclear whether the report relating to Tom Hunter was provided pursuant to section 1102.5 or Evidence Code section 771, which requires production of a writing used to refresh the memory of a witness. On direct examination, defense counsel referred to the report in an attempt to refresh the recollection of the witness. The district attorney objected, whereupon defense counsel provided him with a copy of the statement. We shall assume that defense counsel provided the statement pursuant to the trial court's earlier rulings that such statements were discoverable under section 1102.5, and shall further assume, without deciding, that Evidence Code section 771 does not supersede the constitutional privilege which formed the basis of the holding in *Misner, supra*, 38 Cal.3d 543.

and had a "history of lying." Thus, it does not appear that this statement from the defense report appreciably aided the prosecution's case.

Defendant also complains about the prosecutor's reference to an account by Tom, set forth in the defense report, of a 1976 incident in San Diego which resulted in defendant's arrest. The incident was not described in the report, and the prosecutor did not question him about any specifics of the incident at trial. Tom testified that his information had not come from defendant, but rather from his father. The prosecutor referred to the incident only once, very briefly, during guilt phase argument, and not at all during penalty phase argument; indeed, the prosecutor acknowledged at the penalty phase that there was no evidence of any prior crimes or violent conduct by defendant. Thus, we are unable to perceive how this vague, second-hand reference to an unspecified incident during cross-examination could have perceptibly aided the prosecution.

Finally, defendant complains of the prosecutor's questioning of Tom concerning a letter referred to in the defense report that defendant had written to his brother after his arrest. In that letter, according to Tom's statement, defendant wrote that his prison psychiatrist had also examined Charles Manson; the letter closed with the following postscript: "I am quite sane, too bad, it could have been a good defense."

Defendant characterizes this reference to the letter as "nothing less than devastating." The record does not support the claim. Defendant never claimed to be *other* than sane at the time of the shootings. Indeed, both psychiatrists who testified on his behalf readily admitted that defendant had never exhibited psychotic symptoms or delusions. We are thus unable to perceive how these statements from the defense report appreciably prejudiced defendant or aided the prosecution.

That defendant was the shooter was never seriously in dispute. His defense was premised upon a history of child abuse and depression which ultimately so poisoned his judgment that he was unable to control an impulse to kill his father and stepmother when the opportunity presented itself. Nothing in the defense reports discovered by the prosecution controverted this defense or appreciably aided the prosecution. Accordingly, any error in permitting such discovery was harmless beyond a reasonable doubt.

2. *Request for Judicially Conferred Immunity*

(2a) Defendant next contends that the trial court erred in denying his request to grant "judicial" use immunity to his girlfriend, Judith Goldstein, so as to overcome Goldstein's Fifth Amendment claim. Defendant premises

his argument on the Sixth Amendment right to compulsory process and the Fifth Amendment right to due process.

The district attorney had charged Ms. Goldstein with being an accessory after the fact to the murders. Her case was pending at the time of defendant's trial. The defense called her to testify but she refused to answer any questions on the basis of her Fifth Amendment privilege against self-incrimination. Defense counsel thereupon renewed his request, raised prior to trial, to grant use immunity to Ms. Goldstein. The trial court asked counsel for an offer of proof as to what he expected Ms. Goldstein's testimony to reveal. Counsel, in response, recalled that earlier testimony had established that on the morning of the murder, December 28, 1981, defendant had accompanied Ms. Goldstein to the funeral of the mother of Ms. Goldstein's roommate, Carol Lange. Counsel then explained: "It is my understanding that during the course of that [funeral] ceremony . . . [defendant] made the statement to Judith Goldstein—or a question, possibly—'Why is it the good people die and the bad still live.' [¶] I submit, Your Honor, that it is material to the question of the mental state of the defendant on the 28th day of December of 1981." The trial court denied the request.

(3) It is settled in California that the granting of transactional immunity is conditioned upon a written request by the prosecutor that the witness be compelled to answer. (§ 1324; *In re Weber* (1974) 11 Cal.3d 703, 720 [114 Cal.Rptr. 429, 523 P.2d 229].) (4) (See fn. 4.), (2b) Defendant contends, however, that the defendant in a criminal action should be entitled to request that the court grant use immunity to a defense witness who has knowledge of essential, exculpatory evidence.[4]

The contention is unavailing. As the Attorney General points out, the Courts of Appeal of this state have uniformly rejected the notion that a trial court has the inherent power, in such circumstances, to confer use immunity upon a witness called by the defense. (See *People* v. *Estrada* (1986) 176 Cal.App.3d 410, 418 [221 Cal.Rptr. 922]; *People* v. *DeFreitas*, *supra*, 140 Cal.App.3d at pp. 839-841; *People* v. *Sutter* (1982) 134 Cal.App.3d 806, 812-817 [184 Cal.Rptr. 829].) With few exceptions, federal and state judicial authority across the nation is to the same effect. (See *People* v. *DeFreitas*, *supra*, 140 Cal.App.3d at pp. 838-839; Annot. (1981) 4 A.L.R. 4th 617.)

Though it is possible to hypothesize cases where a judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's

[4]Use immunity protects a witness only against the actual use of his compelled testimony, as well as the use of evidence derived therefrom. Transactional immunity protects the witness against all later prosecutions relating to matters about which he testifies. (*Kastigar* v. *United States* (1972) 406 U.S. 441, 449-453, 460 [32 L.Ed.2d 212, 219-222, 226, 92 S.Ct. 1653]; *People* v. *DeFreitas* (1983) 140 Cal.App.3d 835, 837 [189 Cal.Rptr. 814].)

rights to compulsory process and a fair trial (see e.g., Note, *Separation of Powers and Defense Witness Immunity* (1977) 66 Georgetown L.J. 51), that is not a question we need here decide. For defendant's offer of proof at trial in support of his request fell well short of the standards set forth in the one case which has clearly recognized such a right, *Government of Virgin Islands* v. *Smith* (3d Cir. 1980) 615 F.2d 964. While holding that in certain cases a court may have authority to confer a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense, the *Smith* court also recognized that "the opportunities for judicial use of this immunity power must be clearly limited; . . . the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity . . . . [¶] [T]he defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or it is found to relate only to the credibility of the government's witnesses." (*Id.*, at p. 972.)

As noted above, defense counsel's offer of proof was that Ms. Goldstein would testify defendant was depressed as a result of attending a funeral, and that he had made the statement, "Why is it the good people die and the bad still live." Even assuming that the proffered testimony was not inadmissible hearsay, it did not meet *Smith*'s requirement that the evidence be "clearly exculpatory and essential." At best, the evidence was cumulative of the extensive testimony of other defense witnesses. It was well established that defendant had been abused by his father. Furthermore, defendant's sister testified that she spoke with defendant the day after the murder, and recalled that defendant stated he was feeling depressed from having attended a funeral the previous day. In addition, Dr. Lunde, a psychiatrist, offered his expert opinion that defendant was clinically depressed on the day of the murder and could not, as a result, have committed a willful, deliberate and premeditated murder. In short, defendant failed to demonstrate that the proffered testimony was "clearly exculpatory and essential" to his defense.

Defendant points out that the testimony of three witnesses for the prosecution, Thomas Henkemeyer, Jefferson Schar and Gary Sayers, had been obtained pursuant to a request for transactional immunity by the district attorney under the authority of section 1324. There is no evidence to suggest, however, that the prosecutor intentionally withheld transactional immunity from Goldstein solely to assure the exclusion of her testimony. (5) We agree the prosecutor's duty is to administer the immunity power evenhandedly, with a view to ascertaining the truth, and not as a partisan engaged in a legal game. (*People* v. *Ruthford* (1975) 14 Cal.3d 399,

405 [121 Cal.Rptr. 261, 534 P.2d 1341]; *In re Ferguson* (1971) 5 Cal.3d 525, 531-532 [96 Cal.Rptr. 594, 487 P.2d 1234]; cf. *United States* v. *DePalma* (S.D.N.Y. 1979) 476 F.Supp. 775, 780-782 [conviction reversed because of government's selective grant of immunity to two prosecution witnesses and refusal to grant immunity to two other key defense witnesses]; *United States* v. *Herman* (3d Cir. 1978) 589 F.2d 1191, 1204, cert. den. 441 U.S. 913 [60 L.Ed.2d 386, 99 S.Ct. 2014] [government may not selectively grant or refuse immunity "with the deliberate intention of distorting the judicial fact finding process"].) (2c) However, there is no evidence here that the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence.

Thus, even if in appropriate circumstances an essential witness for a criminal defendant should be granted judicial use immunity—a question we do not decide—the record establishes that the circumstances were not appropriate here and the court did not err in denying the immunity request.

(6) Defendant also asserts that the trial court erred in denying his request to continue his case until the conclusion of Goldstein's case. As Goldstein's testimony was not shown to be essential, however, we cannot say that the trial court abused its discretion in denying the request.

3. *Instruction on CALJIC No. 8.75*

(7a) Defendant next contends that the trial court's instruction pursuant to CALJIC No. 8.75 impermissibly deprived the jury of the opportunity to consider and deliberate upon possible lesser offenses. The contention is without merit.

(8) In *People* v. *Kurtzman* (1988) 46 Cal.3d 322 [250 Cal.Rptr. 244, 758 P.2d 572], we recently construed our holding in *Stone* v. *Superior Court* (1982) 31 Cal.3d 503 [183 Cal.Rptr. 647, 646 P.2d 809], "to authorize an instruction that the jury may not *return a verdict* on the lesser offense unless it has agreed beyond a reasonable doubt that defendant is not guilty of the greater crime charged, but it should not be interpreted to prohibit a jury from *considering* or *discussing* the lesser offenses before returning a verdict on the greater offense." (46 Cal.3d at p. 329, original italics.) (7b) Thus, *Kurtzman* reaffirmed the trial court's broad discretion "to forestall an anticipated deadlock or to assist the jury in moving beyond an actually threatened deadlock by directing the jury under an instruction such as CALJIC No. 8.75 at least as to the sequence in which verdicts will have to be ultimately rendered." (*Id.*, at pp. 331-332.) We concluded the trial court in *Kurtzman* had erred by deviating from the standard charge and instructing the jury it could not "consider" a lesser offense until it had reached

unanimity on the greater offense. (*Id.*, at p. 335.) We held, however, that the error was harmless. (*Ibid.*)

Here, the trial court instructed the jury in the precise language of CALJIC No. 8.75 (1982) that "you must unanimously agree that the defendant is not guilty of first degree murder before you may find defendant guilty or not guilty of second degree murder," and "[y]ou must unanimously agree that defendant is not guilty of second degree murder before you find him guilty or not guilty of voluntary or involuntary manslaughter." While we noted in *Kurtzman* some potential "ambiguity" in the standard instruction (46 Cal.3d at p. 336; see also *People* v. *Hernandez* (1988) 47 Cal.3d 315, 352 [253 Cal.Rptr. 199, 763 P.2d 1289]), we find nothing in the pertinent language of the instruction as given here or in the record of the jury's deliberations as a whole, to suggest that the jury believed it must return a verdict on the greater offense before it could consider or discuss the lesser included offenses. (*People* v. *Hernandez*, *supra*, 47 Cal.3d at pp. 352-353.) Accordingly, we find no error in the court's instructing in the language of CALJIC No. 8.75.

4. *Instruction on the Testimony of Immunized Witnesses*

(9) Defendant next contends that the trial court erred in refusing to give requested cautionary instructions on the testimony of immunized witnesses.

Three prosecution witnesses, Thomas Henkemeyer, Gary Sayers and Jefferson Schar, testified under a grant of immunity from prosecution. Each of the witnesses had been charged as an accessory after the fact in helping defendant flee to Mexico. Each testified as to admissions made by defendant before and after the killings.

Defendant requested jury instructions stating that the testimony of immunized witnesses must be viewed with "suspicion" and examined with "greater care and caution" than the "testimony of an ordinary witness." The trial court modified the requested instruction, directing the jury to determine whether an immunized witness's "testimony has been affected by it [*sic*] or by his prejudice against the defendant," but to weigh the witness's credibility "by the same standards by which you determine the credibility of other witnesses." The trial court also gave the standard instruction on witness credibility (CALJIC No. 2.20), which directed the jury to weigh, inter alia, the "existence or nonexistence of a bias, interest or other motive."

Defendant contends the trial court committed reversible error in failing to give the requested instruction verbatim. The contention lacks merit.

Evidence Code section 411 provides that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." The Penal Code sets forth the exceptions in criminal cases, which include, inter alia, accomplice testimony. (See § 1111 [accomplice testimony insufficient for conviction if uncorroborated].) Thus, it is well settled that trial courts are required, under the appropriate circumstances, to give special cautionary instructions concerning accomplice testimony. (*People* v. *Terry* (1970) 2 Cal.3d 362, 398 [85 Cal.Rptr. 409, 466 P.2d 961].) Generally, however, as we observed in *People* v. *Alcala* (1984) 36 Cal.3d 604, 623 [205 Cal.Rptr. 775, 685 P.2d 1126], "an interested witness' 'entitle[ment] to full credit' under section 411 is a matter for the trier of fact." Accordingly, we rejected in *Alcala* the claim that an informant is analogous to an accomplice, observing: "The exception for accomplice testimony . . . arises from the accomplice's overwhelming motive to shift blame to defendant. He must do so, either to minimize his own liability at trial, or to convince the authorities it is worth immunizing him to obtain his testimony against the defendant. Whatever consideration a jailhouse informant may expect for testifying, *the direct, compelling motive to lie is absent.*" (*Id.*, at p. 624, italics added; see also *People* v. *Hovey* (1988) 44 Cal.3d 543, 565-566 [244 Cal.Rptr. 121, 749 P.2d 776].)

No California authority supports defendant's contention that an immunized witness, unlike an informant, is so analogous to an accomplice that a trial court must, upon request, give cautionary instructions as to the trustworthiness of immunized witness testimony. In *People* v. *Leach* (1985) 41 Cal.3d 92, 106 [221 Cal.Rptr. 826, 710 P.2d 893], we held that a trial court was not required to give such cautionary instructions sua sponte, but did not address a court's duty to give such instructions upon request. Defendant relies on law developed by the federal courts holding that a defendant is entitled on request to an instruction that the testimony of informers, accomplices and immunized witnesses should be viewed with suspicion. (See *United States* v. *Watson* (7th Cir. 1980) 623 F.2d 1198, 1205; *United States* v. *Morgan* (9th Cir. 1977) 555 F.2d 238, 242-243.)

No California decision has adopted or applied the federal rule, however, and the reason is not difficult to perceive. Under federal law the prosecutor cannot grant transactional immunity. (18 U.S.C. § 6002; *United States* v. *Herman, supra,* 589 F.2d at p. 1202; *United States* v. *Leonard* (D.C. Cir. 1979) 494 F.2d 955, 961, fn. 11.) Thus, the government remains free to prosecute the witness after he testifies, as long as the prosecution is not based on the witness's testimony. The grant of immunity therefore does not totally eliminate the witness's incentive to testify falsely. (*United States* v. *Leonard, supra,* 494 F.2d at p. 961, fn. 11.) California law, however,

provides that a witness ordered to testify over a claim of self-incrimination shall be given transactional immunity. (§ 1324; *Daly* v. *Superior Court* (1977) 19 Cal.3d 132, 146 [137 Cal.Rptr. 14, 560 P.2d 1193]; *People* v. *DeFreitas, supra,* 140 Cal.App.3d at pp. 839-840.) The prosecution's leverage over the witness is thereby sharply diminished, as is the witness's motive to falsify. Thus, to paraphrase *Alcala,* "whatever consideration [an immunized witness] may expect for testifying, the direct, compelling motive to lie is absent." (36 Cal.3d at p. 624.)

We conclude, accordingly, that the trial court did not err in refusing to give verbatim the instruction requested by defendant. The general instruction on witness credibility coupled with the modified instruction specifically directing the jury to determine whether the immunized witness's credibility had been affected by the grant of immunity, adequately informed the jury of the necessity to weigh the motives of the immunized witnesses.

5. *Instruction on Transferred Intent*

At defendant's request, the trial court instructed the jury on the doctrine of transferred intent (CALJIC No. 8.65) as follows: "Where one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed."

(10) Defendant now argues that the instruction on transferred intent was unnecessary and improper because both victims in this case were killed. He contends that the instruction may have prejudicially misled the jury to transfer findings of intent, premeditation and deliberation with respect to the killing of his father, Jay Hunter, to the killing of his stepmother, Ruth Chatburn Hunter. The contention is not meritorious even if the doctrine of invited error is ignored.

While we have approved the rule of transferred intent in several cases involving homicides (*People* v. *Sears* (1970) 2 Cal.3d 180, 189 [84 Cal.Rptr. 711, 465 P.2d 847]; *People* v. *Suñic* (1953) 41 Cal.2d 483, 491-492 [261 P.2d 241]; *People* v. *Suesser* (1904) 142 Cal. 354, 366-367 [75 P. 1093]), we have not considered application of the doctrine where both the intended and the unintended victim are killed or injured. (See, however, *People* v. *Czahara* (1988) 203 Cal.App.3d 1468 [250 Cal.Rptr. 836]; *People* v. *Birreuta* (1984) 162 Cal.App.3d 454 [208 Cal.Rptr. 635]; *People* v. *Carlson* (1974) 37 Cal.App.3d 349 [112 Cal.Rptr. 321].) Nor need we do so here. For even assuming arguendo that the giving of the instruction was error, no prejudice could conceivably have resulted therefrom.

The record is unclear as to why defense counsel requested CALJIC No. 8.65. The prosecutor did not object to the instruction but observed that in his view it was not applicable to the facts. Defense counsel responded, "It works both ways . . . ." Apparently counsel thought the instruction would bolster his argument that any heat of passion or diminished capacity defense which mitigated the killing of Jay Hunter would apply to the killing of Ruth Hunter, for that was the only context in which counsel referred to the instruction during closing argument. On rebuttal, the prosecutor pointedly argued to the jury that the transferred intent instruction "has no application to these facts," that in fact defendant had deliberated, premeditated and made a "conscious decision to kill b.th [victims] . . . ."

Indeed, the prosecution's case against defendant was premised entirely on the theory that defendant had committed two premeditated first degree murders. The record amply supported that thesis. The evidence of motive and planning as to *both* killings was overwhelming. Numerous witnesses testified concerning defendant's hatred of his father and bitter resentment of his stepmother. Defendant's grievance against his stepmother stemmed, in part, from her handling of his natural mother's estate. His dispute with her over this matter led to a further estrangement from his father. Several witnesses also testified as to defendant's simmering anger over the fact that his stepmother had apparently called the police to report defendant's unauthorized entry into his parents' home while they were away on vacation. Thomas Henkemeyer, defendant's friend from the Navy, recalled a conversation with defendant shortly before the murders in which defendant discussed plans "to go up and kill his mother and father." Henkemeyer gathered that defendant's motive was "to take vengeance [*sic*] against his mother and step-father [*sic*]." Henkemeyer also recalled receiving a telephone call from defendant shortly after the murders in which defendant stated that he had "killed his mother and father."

The physical evidence also strongly supported the theory that both killings were intentional. Both bodies were found in the bedroom, Jay Hunter's on the bed, Ruth Hunter's sprawled on the floor covering a telephone receiver. Autopsies revealed that Ruth Hunter died from two shotgun blasts to the head, either of which was capable of causing death; Jay Hunter had been shot four times. Eight expended shotgun casings were found in the bedroom and hall.

The only fragment of evidence even remotely suggesting that Ruth Hunter's killing might have been unintentional was Dr. Lunde's testimony that defendant told him he had no memory of shooting Ruth. Dr. Lunde construed this statement as evidence of a posttrauma amnesia, however, not as

evidence that defendant was unaware of Ruth's presence at the time of the killings.

Thus, even assuming that the instruction on transferred intent was neither factually nor legally relevant, it is inconceivable that the jury might have been misled to transfer its findings that defendant premeditated and deliberated the intentional killing of Jay Hunter, to the killing of Ruth Hunter. There was no evidence that Ruth's killing was the unintentional byproduct of the killing of Jay; there was no argument to the jury to that effect; the jury gave no signs that it was confused by the instruction; the prosecutor expressly advised the jury to disregard the instruction and the trial court, of course, directed the jury to ignore any inapplicable instructions. Under the circumstances, we are persuaded that any instructional error—invited or otherwise—was harmless under any standard of prejudice.

B. *Penalty Phase Issues*

1. *Judicially Conferred Immunity*

(11) Defendant contends that the trial court erred in denying his renewed request at the penalty phase of trial to grant immunity to his girlfriend, Judith Goldstein. The contention is without merit.

It is well settled that a defendant is entitled under the Eighth and Fourteenth Amendments to present at the penalty phase of trial all relevant mitigating evidence relating to his character and background or the circumstances of the offense. (*Skipper* v. *South Carolina* (1986) 476 U.S. 1, 4 [90 L.Ed.2d 1, 6, 106 S.Ct. 1669]; *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 110-117 [71 L.Ed.2d 1, 108-112, 102 S.Ct. 869].)

Defense counsel renewed his request at the penalty phase for a grant of immunity to defendant's girlfriend, Judith Goldstein, so that she might offer "evidence in mitigation." Defense counsel made no other offer of proof. As indicated earlier, counsel's only offer of proof in support of the motion at guilt phase was that Ms. Goldstein would testify defendant became depressed while attending the funeral of the mother of Ms. Goldstein's roommate, Carol Lange, and had made a statement about the good dying young while the bad lived on.

Even assuming, without purporting to decide, that the trial court had the authority to confer use immunity on the proposed witness, we cannot conclude on this record that the court erred. There is nothing in the record to demonstrate defendant was denied highly relevant mitigating evidence, or

to reveal the nature of that evidence. Even assuming that the evidence would have generally related to defendant's state of mind on the morning of the murder, we cannot find that the absence of Ms. Goldstein's testimony prejudiced defendant. The jury had already been presented evidence of defendant's purported depression at the guilt phase through the testimony of two psychiatrists. Moreover, defendant expressly indicated in his statement in allocution that his attendance at the funeral made him feel that "it was unfair that [his] father was still alive."

Accordingly, we conclude that the trial court did not err in denying defendant's request that Ms. Goldstein be granted judicial immunity.

2. *Response to Jury Inquiry*

(12) Defendant next contends that the trial court committed reversible error by failing to respond adequately to jury questions concerning the possibility of parole. The contention is without merit.

The trial court did not give the so-called Briggs Instruction which this court invalidated in *People* v. *Ramos* (1982) 30 Cal.3d 553 [180 Cal.Rptr. 266, 639 P.2d 908], reversed *sub nom. California* v. *Ramos* (1983) 463 U.S. 992 [77 L.Ed.2d 1171, 103 S.Ct. 3446], and *People* v. *Ramos* (1984) 37 Cal.3d 136 [207 Cal.Rptr. 800, 689 P.2d 430], certiorari denied 471 U.S. 1119 [86 L.Ed.2d 266, 105 S.Ct. 2367] (*Ramos II*), and the prosecutor did not refer to the Governor's power to pardon or commute a sentence in his argument to the jury at the close of the penalty phase of trial.

During the penalty deliberations, however, the jury sent the court a note with the following questions: "One, under what circumstances could [defendant] be released from prison? [¶] Two, a change in the law and action of the Supreme Court? [¶] We know of several cases wherein the man convicted of sentencing to life [*sic*], without possibility of parole, is out on the streets: Why?"

After consulting with counsel, the trial court delivered the following instruction and admonition to the jury:

"Now as to the first and second questions, you are instructed that under the State Constitution, a governor is empowered to grant a reprieve, pardon, or commutation after sentence, *following conviction of a crime*.

"Under this power, the governor may, in the future, commute or modify a sentence of life imprisonment without possibility of parole, to a lesser sentence. That would include the possibility of parole.

"A sentence of life imprisonment, without a possibility of parole, *means that the defendant will spend the remainder of his natural life in prison*. Therefore, the matter of parole is not to be considered by you in determining the punishment for the defendant.

"If, upon consideration of the evidence, you believe that life imprisonment, without possibility of parole, is the proper sentence, you must assume those officials charged with the operation of our prison system will perform their duties in that regard in a correct and responsible manner.

"*It would be a violation of your duty, as jurors, if you were to fix the penalty at death because of a doubt that the prison authorities or the governor of the state will properly carry out their responsibilities.*

"Therefore, you are limited to those matters that are properly before you in this case, which have been brought to your attention by the evidence and by the instructions of the Court, *and are not to consider matters that are not properly before you by the evidence or the instructions of the Court*.

"Now, I believe that those would cover the matters that are properly before you, and should aid and assist you in your decisions and your deliberations in these matters." (Italics added.)

In an effort to supplement the foregoing instruction, defense counsel moved to reopen the penalty phase to present evidence that no defendant's life sentence had been commuted in recent times, and also asked the court to question the jurors concerning their supposed knowledge of persons who had been released from life sentences. The trial court denied both requests.

In *Ramos II, supra*, 37 Cal.3d at page 159, footnote 12, we observed that while the trial court should not instruct as to the Governor's commutation power in the first instance, when the jury itself raises the issue, "the matter obviously cannot be avoided and is probably best handled by a short statement indicating that the Governor's commutation power applies to both sentences but emphasizing that it would be a violation of the juror's duty to consider the possibility of such commutation in determining the appropriate sentence . . . ."

Though the trial court here did not have the benefit of the foregoing advice because *Ramos II* was decided after the trial in this case, it anticipated our concerns by correctly admonishing the jurors that in determining defendant's sentence they were not to consider the governor's power to commute or modify sentences, including the power to grant parole, that it would violate their duty as jurors if they were to fix the sentence at death

out of a concern for possible future actions by the Governor or the parole board, and that they were not to consider any matters not properly before them by the evidence or the instructions. As we have previously held, such curative instructions, directing the jury not to make any use of the governor's commutative and parole powers, are adequate to advise the jury as to their proper sentencing considerations and responsibilities. (*People* v. *Hovey, supra,* 44 Cal.3d at p. 584; *People* v. *Coleman* (1988) 46 Cal.3d 749, 780-782 [251 Cal.Rptr. 83, 759 P.2d 1260]; *People* v. *Hamilton* (1988) 45 Cal.3d 351, 372-376 [247 Cal.Rptr. 31, 753 P.2d 1109].) Furthermore, as we observed in *Hovey,* in view of the trial court's clear and direct instructions not to consider extraneous matters, we "see no likelihood of prejudice from the fact that the trial court failed to give further explanation that the Governor's commutation power would apply to both a life without parole sentence and a death sentence." (*People* v. *Hovey, supra,* 44 Cal.3d at p. 584.) Indeed, the court did inform the jury without limitation that the governor's commutation powers apply "after sentence following conviction of a crime."

Defendant, nevertheless, urged at oral argument that the trial court may have misled the jury by instructing that "the matter of parole is not to be considered by you in determining the punishment for the defendant." We perceive no possibility, however, that the jury might thereby have been led to believe that they might consider the governor's commutation power but not his parole power. That interpretation of the court's statements is entirely unreasonable. As noted, the jury was informed that they would violate their oath as jurors if they were to fix the penalty at death because of a doubt that the governor or the parole board would properly carry out their responsibilities. They were informed in no uncertain terms that they were "not to consider matters that are not properly before [them] by the evidence or the instructions of the Court." Accordingly, we perceive no possibility that the jury was confused as to its proper sentencing considerations and responsibilities.

Defendant also contends the trial court erred prejudicially in denying counsel's request to reopen the penalty phase to show that no life prisoner had received a commutation in recent memory. Though the United States Supreme Court in *Ramos* v. *California, supra,* 463 U.S. 992, concluded that the Briggs Instruction was not violative of the federal constitution, in part because "the defendant may offer evidence or argument regarding the commutation power" (*id.*, at pp. 1004-1005, fn. 19 [77 L.Ed.2d at p. 1183]), that does not suggest the constitution compels such evidence. Indeed, where—as here—the jury has been admonished to disregard the commutation power, such evidence would have been wholly irrelevant. The trial court thus did not err in denying counsel's request.

Finally, defendant contends that the trial court erred in denying counsel's request, pursuant to section 1120, that it question the jury concerning the statement in their note, "[w]e know of several cases wherein the man convicted of sentencing to life [*sic*], without possibility of parole, is out on the streets." Under section 1120, if the court is put on notice that a juror "has any personal knowledge respecting a fact in controversy in a cause," it must examine the juror "to determine whether good cause exists for his discharge . . . ." (§ 1120; *People* v. *McNeal* (1979) 90 Cal.App.3d 830, 837 [153 Cal.Rptr. 706].) In the present case, it is far from clear that the jury's statement indicated "personal knowledge of facts in controversy" within the meaning of section 1120, rather than merely general awareness of the availability of commutation and parole and the perception that many death sentences have been reversed. (See *Ramos II, supra,* 37 Cal.3d at p. 159, fn. 12.) In any event, as previously noted, we find the trial court's direct admonitions to the jury not to consider any matters not properly before them by way of evidence or instructions, were adequate to redirect the jury's attention to its proper sentencing responsibilities. (*People* v. *Hovey, supra,* 44 Cal.3d at p. 584.)

3. *Alleged Brown Error*

(13a) Defendant contends that the court's instruction misled the jury regarding the scope of its sentencing responsibility and discretion.

The trial court instructed the jury in accordance with section 190.3 (former CALJIC No. 8.84.2).[3] In *People* v. *Brown* (1985) 40 Cal.3d 512, 540-544 [220 Cal.Rptr. 637, 709 P.2d 440] (revd. on other grounds *sub nom. California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]), we recognized that this instruction, given in isolation, had the potential for misleading the jury as to the scope of its sentencing discretion. "Our concerns were twofold and interrelated: that a juror might understand his function as (i) merely the 'counting' of factors and then (ii) reaching an 'automatic' decision, with no exercise of personal responsibility for deciding, by his own standards, which penalty was appropriate." (*People* v. *Milner* (1988) 45 Cal.3d 227, 256 [246 Cal.Rptr. 713, 753 P.2d 669]; see *People* v. *Burton* (1988) 48 Cal.3d 843, 869 [258 Cal.Rptr. 184, 771 P.2d 1270]; *People* v. *Allen* (1986) 42 Cal.3d 1222, 1277 [232 Cal.Rptr. 849, 729

[3]The court stated: "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose the sentence of death. However, if you determine that the mitigating circumstances outweight [*sic*] the aggravating circumstances, you shall impose the sentence of confinement in the State Prison for life without the possibility of parole."

P.2d 115].) (14) Therefore in cases such as this, tried before *Brown*, we examine the entire record "to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion . . . . ." (*People* v. *Brown*, *supra*, 40 Cal.3d at p. 544, fn. 17.)

(13b) Here, there is no possibility of jury confusion concerning its responsibility to weigh, rather than count, the applicable factors. In addition to the standard CALJIC No. 8.84.2 instruction, the trial court correctly informed the jury as to how it was to undertake the weighing process as follows: "In weighing the aggravating and mitigating factors, you are not to merely count the numbers on each side. You are instructed rather, to weigh and consider the factors. One mitigating or aggravating circumstance may be sufficient to support a decision that death is or is not the appropriate punishment in this case. [¶] The weight you give to any factor is for you, individually, to decide. [¶] The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment."

Defendant asserts, however, that the prosecutor's argument relieved the jury of its responsibility to serve as conscience of the community, to decide, by its own moral standards, which penalty was appropriate. In support, defendant cites two statements from the prosecutor's closing argument. The first urged the jury "to apply the law. You were sworn to apply the law regardless of how distasteful a result may be to you." The second statement was as follows: "After you make a determination as to the appropriate existence or nonexistence of the aggravating and mitigating circumstances in this case, then your choice is a real simple one. I don't mean to be callous when I say that, believe me. Your choice is one of balancing. That's the test. It's just a balancing test, and, indeed, any one factor which you find to be persuasive and true can be the factor that you can rely upon in reaching your verdict, whether it be for death or whether it be for life without possibility of parole."

Defendant asserts that the jury was misled by the prosecutor's exhortation to apply the law no matter how "distasteful," and his suggestion that the task was a "simple one . . . just a balancing test . . . ." Viewed in context, however, it is apparent that by urging the jury to "follow the law regardless of how distasteful" the prosecutor was simply exhorting the jurors to abide by their oaths, to remain faithful to their assurances during voir dire that they could put aside their personal feelings about the death penalty and decide the appropriate punishment based on the evidence and facts presented. Indeed, just moments after his reference to the jury's duty "to follow the law," the prosecutor recalled that during voir dire, "counsel

and I asked you questions regarding the subject of the death penalty . . . . We posed questions in a vacuum and you responded in that context, of course. As we seat ourselves in this courtroom today, the vacuum is no longer in existence. You have the facts before you. So essentially what you have to do . . . is make a resolution of what the facts are . . . *and then make a moral assessment as triers of the facts.*"

Defense counsel further emphasized the jury's discretion to exercise independent moral judgment. He informed the jury: "[T]he law is quite clear, regardless of what facts in aggravation or mitigation you may find. You may still say, 'I will be merciful.' You may still say that 'I am not going to exact the extreme penalty.' You can still say that the defendant is deserving of the right to live a life and die of natural consequences, even if in prison."

In light of these arguments, there is no reasonable possibility that the jury was misled as to its personal moral responsibility to determine the appropriate punishment.

Nor does it appear that the jury was misled by the prosecutor's offhand remark that its choice was a "simple one." In context, it is apparent that the prosecutor was explaining to the jury that its decision was anything but simple. For in the very next breath the prosecutor emphasized that in balancing the aggravating and mitigating factors, "any one factor which you find to be persuasive and true can be the factor that you can rely upon in reaching your verdict, whether it be for death or whether it be for life without possibility of parole. [¶] In other words . . . if you conclude that there are five factors pointing one way and one pointing another way and if you individually conclude that the one factor . . . has more persuasive value and more significance in your mind, then you can conclude that that should be the direction I'd voice my verdict . . . ."

Defense counsel echoed the prosecutor's remarks in his final words to the jury: "We can go on and on . . . but I want to leave you with one thought, and that is this: regardless of what aggravating circumstances are present here, if you find any one mitigating circumstance that has so much weight in your mind that it overshadows any and all of the aggravating circumstances, you have the right to return a verdict of . . . life without possibility of parole . . . . You can do so because of pity. You can do so because of compassion. You can do so because of sympathy or you can do so for just outright mercy. That is what the law allows you to do and you can apply that law if you so choose . . . . Its a question of what you feel in your own heart and in your own conscience."

This case is thus essentially indistinguishable from *People* v. *Burton*, *supra*, 48 Cal.3d 843, where we held it was not prejudicial for the prosecu-

tor to urge the jury to "follow the law" where he also stressed that the jury was the "conscience of the community," that it spoke "'on behalf of the community . . . as to what the right thing to do in this case is.'" (*Id.*, at pp. 870-872; see also *People* v. *Hendricks* (1988) 44 Cal.3d 635, 655 [244 Cal.Rptr. 181, 749 P.2d 836] ["'[W]e see no impropriety in a prosecutor urging that the jurors "follow the law" and base their penalty decision on a weighing of the applicable factors, so long as it is understood that *inherent in the weighing process itself is the determination of "appropriateness."*'"].) "'Obviously, when jurors are informed that they have discretion to assign whatever value they deem appropriate to the factors listed, *they necessarily understand they have discretion to determine the appropriate penalty.*'" (*People* v. *Burton*, *supra*, 48 Cal.3d at p. 873, original italics.)

In short, it is manifest from the record that the prosecutor in this case was not urging the jury to disregard their personal views concerning the appropriateness of death, but just the reverse; the prosecutor counseled the jury that one mitigating factor could outweigh five aggravating factors if it so decided, and he urged the jury not once, but twice, to make a "moral assessment" of the facts. Hence, we conclude no reasonable jury could have been misled as to its responsibility and discretion to determine, through the weighing process, whether death or life without possibility of parole was the appropriate punishment for defendant. (*People* v. *Brown* (1988) 46 Cal.3d 432, 454 [250 Cal.Rptr. 604, 758 P.2d 1135].)

4. Extreme Mental or Emotional Disturbance as a Mitigating Factor

(15) In accordance with section 190.3, subdivision (d) (CALJIC No. 8.84.1) the jury was instructed to consider "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Defendant asserts that the foregoing instruction, by referring to an "extreme" condition, indicated that any "lesser disturbance" would not be a possible mitigating factor. We cannot agree.

First, it should be noted that the trial court instructed the jury that it was to consider "any other circumstance which extenuates the gravity of the crime . . . ." (§ 190.3, factor (k); CALJIC No. 8.84.1.) In *People* v. *Ghent* (1987) 43 Cal.3d 739 [239 Cal.Rptr. 82, 739 P.2d 1250], we concluded that this "'catchall' provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed 'extreme,' nonetheless mitigates the seriousness of the offense." (*Id.*, at p. 776; accord *People* v. *Adcox* (1988) 47 Cal.3d 207, 270 [253 Cal.Rptr. 55, 763 P.2d 906]; *People* v. *Brown*, *supra*, 46 Cal.3d at pp. 457-458; *People* v. *Babbitt* (1988) 45 Cal.3d 660, 720-721 [248 Cal.Rptr. 69, 755 P.2d 253]; *People* v. *Lucky* (1988) 45 Cal.3d 259, 296-297 [247 Cal.Rptr. 1, 753 P.2d 1052].)

The trial court and counsel went beyond this, however, focusing specifically on the evidence of emotional disturbance, i.e., the emotional and physical abuse defendant suffered at the hands of his father, which he claimed served to mitigate the offense. At defendant's request the court instructed that, in addition to the statutory mitigating factors, the jury could consider as an additional mitigating factor "whether the defendant was subjected to physical abuse or cruelty during his formative years." In addition, the prosecutor and defense counsel devoted considerable argument to defendant's claim of emotional disturbance. The prosecutor discussed the evidence that defendant was abused as a child and the psychiatrists' testimony concerning its effect on defendant, as well as defendant's claim that he was depressed on the day of the murder, arguing that such evidence—even if true—did not merit lesser punishment. Defense counsel argued in response that the proof was overwhelming defendant was a battered child, and that "[t]here is no question from both of his doctors . . . there was emotional disturbance . . . . So, therefore we have another factor in mitigation."

Thus, far from precluding the jury from considering defendant's evidence of emotional disturbance, the court and counsel directly addressed such evidence. In this respect, this case is practically indistinguishable from *People* v. *Hernandez*, *supra*, 47 Cal.3d at pages 359-360, *People* v. *Babbitt*, *supra*, 45 Cal.3d at pages 720-721 and *People* v. *Lucky*, *supra*, 45 Cal.3d at pages 296-297, where we similarly concluded that the court's instructions and the arguments of counsel properly allowed the jury to consider any mitigating evidence relating to defendant's alleged mental disturbance at the time of the crimes. Defendant's contention to the contrary is clearly without merit.

5. Prosecutor's Comment Concerning Defendant's Statement in Allocution

Over the objections of the prosecution, the trial court permitted defendant to make a statement in allocution. Later, during the prosecutor's closing argument, the prosecutor made several references to defendant's statement and twice noted that defendant was not subject to cross-examination concerning the allocutory statement. Defense counsel objected to the prosecutor's remarks concerning cross-examination. The trial court, in response, explained to the jury: "[T]he court has allowed, in this case, the defendant to exercise what is known as a right of allocution . . . it's the matter by which a party may make a statement in these particular types of instances.

The party, of course, who makes the statement is not under oath and, as a witness on the stand, of course, is not subject to direct cross-examination."

(16) Defendant now contends that the prosecutor's comments concerning the lack of cross-examination constituted prejudicial error. The contention is without merit.

We have held that the defendant does *not* have the " 'right to address the sentencer without being subject to cross-examination' in capital cases." (*People* v. *Robbins* (1988) 45 Cal.3d 867, 888-890 [248 Cal.Rptr. 172, 755 P.2d 355].) As we recently explained in *People* v. *Keenan* (1988) 46 Cal.3d 478, 511 [250 Cal.Rptr. 550, 758 P.2d 1081]: "*Robbins* is persuasive that the right of allocution is unavailable in California capital penalty trials. Its principal purpose in such cases would be to cloak defendant's right to testify with a unique immunity from cross-examination by the People. Recognition of a right to allocution is unnecessary to a fair trial and runs counter to the [death penalty] statute's purpose of providing the sentencer with all relevant information bearing on the appropriate penalty."

In light of our holding that neither the constitution nor the death penalty statute gives defendant "the right to testify with a unique immunity from examination by the People" (*People* v. *Keenan, supra,* 46 Cal.3d at p. 511), we can hardly fault the prosecutor here for simply calling attention to the fact that defendant's testimony was not subject to cross-examination. Defendant's assertions that the prosecutor's remarks impermissibly implied that he possessed unrevealed facts to impeach defendant's statement, and constituted improper comment on defendant's silence, are patently without merit. We have examined the record and find nothing in the prosecutor's remarks to support either claim.

6. *Defendant's Background and Character Evidence*

(17) The trial court instructed the jury in terms of former CALJIC No. 8.84.1, but modified factor (k) of that instruction to state that the jury shall consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, *including but not limited to the defendant's character, background, history, mental condition, and physical condition on record.*"

Citing this court's decisions in *People* v. *Easley* (1983) 34 Cal.3d 858 [196 Cal.Rptr. 309, 671 P.2d 813] and *People* v. *Davenport* (1985) 41 Cal.3d 247 [221 Cal.Rptr. 794, 710 P.2d 861], defendant maintains that the court's instructions improperly limited the jury's consideration of his mitigating background and character evidence. In determining whether the sentencer

was adequately informed of its responsibility to consider all the defendant's mitigating evidence, we examine the instructions and arguments as a whole. (*People* v. *Lucky, supra,* 45 Cal.3d at p. 298.) That examination persuades us the jury could not have been misled as to its duty to weigh and consider all the mitigating evidence. As indicated, the court modified the standard factor (k) instruction, specifically directing the jury to consider defendant's background and character evidence; the prosecutor in his argument addressed the potentially mitigating evidence and defense counsel stressed its mitigating effect. On this record, we conclude that the jury could not possibly have been misled about its responsibility to consider all the proffered evidence. (See *People* v. *Burton, supra,* 48 Cal.3d at pp. 866-867; *People* v. *Keenan, supra,* 46 Cal.3d at pp. 514-515.)

The judgment is affirmed in its entirety.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Eagleson, J., and Kennard, J., concurred.

APPENDIX B

Orden Dur

ORDER DENYING REHEARING

Crim 23630 No. S004613

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, Respondent

v.

MICHAEL WAYNE HUNTER, Appellant

SUPREME COURT
FILED
FEB 1 - 1990
Robert Wandruff Clerk
DEPUTY

Appellant's petition

for rehearing DENIED.

Opinion modified.

Acting Chief Justice

Supreme Court of the United States

No. A-735

Michael Wayne Hunter,

Petitioner

v.

California

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 1, 1990.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 23rd day of April, 1990.

APPENDIX C

CERTIFICATE OF FILING AND SERVICE

Attorney:

Roy M. Dahlberg
Deputy State Public Defender
1107 Ninth Street, Suite 300
Sacramento, CA 95814
Telephone: 916-322-2676

No.: 89-
October Term, 1989

MICHAEL WAYNE HUNTER,

Petitioner

v.

STATE OF CALIFORNIA,

Respondent

I, THE UNDERSIGNED, say: I am a member of the Bar of this Court;

I have served the PETITION FOR WRIT OF CERTIORARI as follows: To Clerk, Supreme Court of the United States, Room 30, One First Street, N.E., Washington, D. C. 20543, an original and ten copies via the United States postal service; AND by placing the number of copies designated below in a separate envelope addressed for and to each addressee named as follows:

Attorney General of the State of California 1515 K Street, Suite 511 Sacramento, CA 95814 (THREE COPIES SERVED)	Michael Wayne Hunter C-83600 P. O. Box C-83600 Tamal, CA 94964 (ONE COPY SERVED)

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at Sacramento, California on the 29th day of May, 1990.

There is delivery service by the United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I certify that all parties required to be served have been served. (U.S.S.C. §29.3.)

I certify under penalty of perjury that the foregoing is true and correct.

Dated at Sacramento, California this 29th day of May, 1990.

Roy M. Dahlberg
ROY M. DAHLBERG

STATE OF CALIFORNIA — GEORGE DEUKMEJIAN, Governor

OFFICE OF THE STATE PUBLIC DEFENDER
1107 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814-4469
(916) 322-2676

May 29, 1990

United States Supreme Court
Office of the Clerk
Washington, D. C. 20543

Attn: Clerk

Dear Sir or Madam,

Enclosed are the original and ten copies of the Petition for Writ of Certiorari in the case of Michael Wayne Hunter v. California. Pursuant to Justice O'Connor's granting of an additional thirty days to file the Petition, it is due June 1, 1990. Also included is Mr. Hunter's Motion for Leave to Proceed in Forma Pauperis and his Affidavit in support of that Motion.

I hope that all of this is in order. If there are any problems or if you have in questions please call me.

Thank you in advance for your consideration.

Sincerely,

Roy M. Dahlberg

Roy M. Dahlberg
Attorney for Petitioner

cc: Michael Hunter
Cynthia Thomas

RMD:jmh

ORIGINAL

ORIGINAL

No. 89-7671

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

MICHAEL WAYNE HUNTER, *Petitioner*

v.

STATE OF CALIFORNIA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP, Attorney General
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Attorneys for Respondent

QUESTIONS PRESENTED

Whether a capital defendant may compel a trial court to grant immunity to a defense witness under the Fifth, Sixth, Eighth or Fourteenth Amendments.

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No. 89-7671

IN THE

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OPINION BELOW

The opinion by the California Supreme Court is reported at 49 Cal.3d 957, 782 P.2d 608, 264 Cal.Rptr. 367 (1989), mod. 50 Cal.3d 133a (1990).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On February 9, 1984, a jury found petitioner Michael Wayne Hunter guilty of two counts of first degree murder with multiple-murder special circumstances. Cal. Pen. Code §§ 187, 190.2(a)(3). C.T. 164-66, 382.[1] After a penalty trial, the jury returned a verdict of death. C.T. 390, 479. On March 23, 1984, the trial court denied petitioner's automatic motion to reduce the penalty, Cal. Pen. Code § 190.4(e), and sentenced petitioner to death. C.T. 496-99. On December 7, 1989, the California Supreme Court affirmed petitioner's judgment upon his automatic appeal. Cal. Pen. Code § 1239(b). On February 1, 1990, that court modified its opinion without affecting the result, and denied petitioner's application for rehearing. *People v. Hunter*, 49 Cal.3d 957, 782 P.2d 608, 264 Cal.Rptr. 367, mod. 50 Cal.3d 133a.

STATEMENT OF FACTS

On the evening of December 28, 1981, petitioner, who was then 23 years old, shot to death his father and stepmother, Jay and Ruth Hunter, in the bedroom of their home. He killed his father with four shotgun blasts, and his stepmother with two. About a month before, petitioner told his friend, Thomas Henkemeyer, he intended to commit the killings. Petitioner expressed a number of grievances against his parents; he believed he was being cheated out of his inheritance from his natural mother, whose will

1. "C.T." refers to the clerk's transcript on appeal to the California Supreme Court. "R.T." refers to the reporter's transcript of proceedings.

was being handled by his stepmother; and he resented that his stepmother had reported him to the police for breaking into their house while she and Jay Hunter were away on vacation. In mid-December petitioner brought a shotgun to Henkemeyer's residence and said he planned to use it to kill his parents. Henkemeyer went to Minnesota to visit family over the holidays, leaving the keys to his car and apartment with petitioner. Petitioner called Henkemeyer twice in Minnesota and admitted the killings. He said he had spoken to a lawyer and was planning to leave the country.

Petitioner told another friend, Jefferson Schar, about the murders. He told Schar that an unidentified gunman actually did the shooting at his direction. He said he told the gunman to shoot his father when his father said, "You don't have the balls enough to do anything. . . ." When his stepmother said, "No, Mike, don't," the gunman shot her too. Petitioner fled to Mexico with Schar's help.

Once in Mexico petitioner contacted another friend, Jeffrey Luther, who lived in San Diego. They met at a restaurant located in the United States near the border, and petitioner told Luther he had shot his parents. Luther later agreed to purchase some items for petitioner, but informed the police in the meantime. When Luther and petitioner again met at the restaurant, the police were waiting and arrested petitioner.

Physical evidence also connected petitioner to the murders. A search of his home and vehicles turned up a shirt with blood on it, glass fragments that matched glass from the window petitioner broke to enter his parents' residence, and a cleaning bill for a jacket with the notation "pre-spot for blood." The police also found a black motorcycle helmet in petitioner's home. A neighbor who had been walking his dogs near the Hunter

home on the night of the murders had been confronted and shot at by a young man wearing such a helmet. Petitioner explained to his friend Henkemeyer that this encounter had occurred as he was leaving his parents' residence. He did not think the man could identify him because he had been wearing the helmet.

The defense did not contest that petitioner killed his parents, but attempted to show that the killings were without malice and were not premeditated due to petitioner's intense hatred for his father caused by his father's abuse of him. Four former neighbors and family friends testified that Jay Hunter verbally and physically abused petitioner during his youth. Petitioner's younger brother Tom also testified that Jay Hunter had often hit petitioner, but his sister Mary said she had never witnessed any beatings. Mary Hunter also related that petitioner told her on the day after the murders, that he was depressed because of a funeral he had attended for a friend's mother. A psychiatrist testified that petitioner was clinically depressed on the day of the shootings and that it was unlikely he had premeditated the killings.

The prosecution presented no additional evidence at the penalty phase. The defense presented additional testimony from petitioner's brother Tom, who asked the jury to spare petitioner's life to prevent additional suffering by the family. The court also permitted petitioner to give an unsworn statement in allocution not subject to cross-examination. Petitioner recounted his life and achievements and described his deteriorating relationship with his father. He mentioned the funeral he had attended on the day of the murders and said this made him think of his natural mother's death from cancer. He began to feel it was unfair that his father was still alive. He admitted

responsibility for the killings, although he said he could not remember his stepmother being in the room. He told the jury he thought he could still contribute to society, especially with the help of counselling. *People v. Hunter*, 49 Cal.3d at 964-70, 974, 782 P.2d at 610-14, 617, 264 Cal.Rptr. at 369-73, 376.

ARGUMENT

A CRIMINAL DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO OBTAIN JUDICIALLY CONFERRED USE IMMUNITY FOR A DEFENSE WITNESS WHO PROPERLY INVOKES THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Petitioner asks this court to grant a writ of certiorari to decide whether the Fifth, Sixth, Eighth, and Fourteenth Amendments authorize and compel state trial judges to grant testimonial use immunity to defense witnesses upon an adequate showing of need. The great majority of courts to consider this issue agree that the decision to grant immunity is a prosecutorial, not judicial function. In any event, this is a particularly inappropriate case to decide the issue since petitioner's showing of need failed to satisfy the standard of the one federal circuit that approves of judicial immunity.

A. Procedural Background

The district attorney charged appellant's girlfriend, Judith Goldstein, with being an accessory to the murders. At the request of her attorney, Ms. Goldstein's case was continued until the conclusion of petitioner's trial.[2/] Petitioner called her to testify in his defense, but she refused to answer any questions, invoking her privilege against self-

2. Ms. Goldstein's attorney stated, "Her case has been continued on various occasions because I determined, apparently with the concurrence of the District Attorney that it was appropriate to have her case proceed to trial after Mr. Hunter's matter was resolved." R.T. 5738. The full extent of Ms. Goldstein's culpability was not revealed at petitioner's trial. The record of petitioner's trial does show that she supplied an address where petitioner could receive a phony birth certificate after the murders, and that she took possession of some of petitioner's personal property. R.T. 4773-75, 5019-20.

incrimination. Defense counsel asked the court to grant use immunity to Ms. Goldstein. The trial judge asked for an offer of proof of the anticipated content of her testimony. Counsel explained that Ms. Goldstein would testify about a statement petitioner made at a funeral he attended on the day of the murders:

> "It is my understanding that during the course of that [funeral] ceremony . . . [petitioner] made the statement to Judith Goldstein -- or a question, possibly -- 'why is it the good people die and the bad still live.' [¶] I submit, Your Honor, that it is material to the question of mental state of the defendant on the 28th day of December of 1981."

The trial court denied the defense request for immunity. *People v. Hunter*, 49 Cal.3d at 972-73, 782 P.2d at 616, 264 Cal.Rptr. at 374-75. Defense counsel renewed his request for immunity for Ms. Goldstein at the penalty phase, stating she might offer "evidence in mitigation." Counsel made no additional offer of proof of her expected testimony. The trial court again denied the request. 49 Cal.3d at 980-81, 782 P.2d at 621, 264 Cal.Rptr. at 380.

B. Neither The Compulsory Process Nor Due Process Clause Empower Courts To Grant Immunity

Petitioner argues that the compulsory process clause of the Sixth Amendment and due process clause of the Fifth and Fourteenth Amendments entitled him to compel a judicial grant of immunity for Ms. Goldstein so that her testimony could be secured despite her exercise of her privilege against self-incrimination.

This Court has stated, "No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one. . . ." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 260 (1983) (holding that "a deponent's civil deposition testimony, closely tracking his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony . . ., and therefore may not be compelled over a valid assertion of his Fifth Amendment privilege"); *see also*, *United States v. Doe*, 465 U.S. 605, 616-17 (1984); *but see*, *Autry v. McKaskle*, 465 U.S. 1085, 1087-88 & n. 3 (1984) (Marshall, J., dissenting from denial of certiorari). Both *Pillsbury Co v. Conboy* and *United States v. Doe* concerned application of the federal immunity statute, 18 U.S.C. §§ 6002 and 6003. In those decisions the Court observed:

> "[I]n passing the use immunity statute, 'Congress gave certain officials in the Department of Justice exclusive authority to grant immunity.' 'Congress foresaw the courts as playing only a minor role in the immunizing process. . . .' The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation."

United States v. Doe, 465 U.S. at 616 (quoting *Pillsbury Co. v. Conboy*, 459 U.S. at 253-54 & 254 n. 11).

California's Legislature has similarly enacted an immunity statute, California Penal Code section 1324,[3/] that assigns the decision to seek immunity exclusively to the prosecuting attorney. An important difference between the state and federal statutes is that the state law permits only transactional immunity from all prosecution for crimes revealed in the witness' compelled testimony, and not the more limited use immunity permitted under federal law. Like under federal law, however, the California statute grants the court no authority to independently immunize a witness. *People v. Hunter*, 49 Cal.3d at 973, 786 P.2d at 616, 264 Cal.Rptr. at 375 ("It is settled in California that the granting of testimonial immunity is conditioned upon a written request by the prosecutor that the witness be compelled to answer.").

---

3. California Penal Code § 1324 provides:

> "In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and if the district attorney of the county in writing requests the superior court in and for that county to order that person to answer the question or produce the evidence, a judge of the superior court shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, that person shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with the order, he was required to answer or produce evidence. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order."

Petitioner nevertheless asserts that courts have inherent power to grant use immunity in order to vindicate a criminal defendant's Sixth Amendment right to compulsory process and Fifth and Fourteenth Amendment right to due process.

Petitioner cites no case which holds that judicial power to grant immunity inheres in the Sixth Amendment. In *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), the Court of Appeals for the Second Circuit decisively rejected that argument.

> "The established content of the Sixth Amendment does not support a claim for defense witness immunity. Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's nonprivileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. While the prosecutor may not prevent or discourage a defense witness from testifying, it is difficult to see how the Sixth Amendment of its own force places upon either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity."

Id. at 773-74, citation omitted.

One federal circuit court has held that judicial immunity may be ordered to vindicate a defendant's due process right to present exculpatory evidence. *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980). The court stated that judicial immunity was not "a new or unique constitutional right, but rather . . . a new remedy to

protect an established right." *Id.* at 971. The court went on to explain the scope of its new remedy:

> "[B]efore a court can grant immunity to a defense witness, it must be clear that an application has been made to the district court naming the proposed witness and specifying the particulars of the witness' testimony. In addition, the witness must be available and the defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses. Once the court determines that the defendant has satisfied this threshold burden, the focus then shifts to consideration of the state's countervailing interests, if any."

Id. at 972-73, footnote omitted.[4/]

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4. The *Smith* court alternatively held that the government could be forced to grant immunity or face a judgment of acquittal when, through misconduct, the government deliberately distorts the factfinding process. 615 F.2d at 974. In *Smith*, the United States Attorney refused to consent to a grant of immunity though the local prosecutor, the Virgin Island's Attorney General, had agreed to grant immunity to the defense witness. *Id.* We have no doubt that in an appropriate case dismissal may be ordered for deliberate government misconduct intended to distort the factfinding process. In some circumstances, the prosecutor may prefer to grant immunity to a witness rather than suffer a dismissal where such misconduct has been shown. Petitioner suggests that the trial prosecutor below engaged in "intentional interference with petitioner's constitutional right to present . . . evidence" by not objecting to Ms. Goldstein's request to continue her case until petitioner's concluded. Petition at 19. This did not constitute misconduct. One defendant's case had to be tried first. It was far more sensible to try petitioner's case before Ms. Goldstein's. Had petitioner been acquitted, the prosecutor would have had little incentive to proceed against Ms. Goldstein. Thus, the state supreme court found, "[T]here is *no evidence* here that the prosecutor intentionally refused to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory testimony." *People* v. *Hunter*, 49 Cal.3d at 975, 782 P.2d at 617,

Every other federal circuit court to consider the question has rejected the Third Circuit's *Smith* holding as being a violation of the doctrine of separation of powers. *See e.g., United States v. Capozzi*, 883 F.2d 608, 614 (8th Cir. 1989); *Mattheson v. King*, 751 F.2d 1432 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138; *United States v. Pennell*, 737 F.2d 521, 526-28 (6th Cir. 1984), *cert. denied*, 469 U.S. 158; *United States v. Gottesman*, 724 F.2d 1516, 1523-24 (11th Cir. 1984); *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *United States v. Heldt*, 668 F.2d 1238, 1282-83 (D.C. Cir. 1984), *cert. denied*, 456 U.S. 926; *United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir. 1982), *cert. denied*, 459 U.S. 825; *see also*, *United States v. Davis*, 623 F.2d 188, 192-93 (1st Cir. 1980); *United States v. Klauber*, 611 F.2d 512, 517 (4th Cir. 1979), *cert. denied*, 446 U.S. 908; *United States v. Smith*, 542 F.2d 711, 715 (7th Cir. 1976); *United States v. Alessio*, 528 F.2d 1079, 1080-82 (9th Cir. 1976), *cert. denied*, 426 U.S. 948.

Undeniably, a defendant has a right to obtain truthful exculpatory evidence possessed by the prosecutor. *See*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963). But this does not mean the prosecution must assist the defendant by extracting from others evidence it does not have through a grant of immunity. As explained by the Second Circuit,

> "The concept of a trial as a search for the truth has always failed of full realization whenever important facts are shielded from disclosure because of a lawful privilege. The key fact needed to prove a defendant's innocence may be contained in a client's privileged admission to his attorney or a husband's privileged admission to his wife, as well as in the testimony of a witness protected by the privilege against self-incrimination."

United States v. Turkish, 623 F.2d at 775.

Judicial immunity poses a serious threat to the prosecutorial crime-charging function. The state has a "heavy burden" of proving that its case against a witness has not been assisted by the witness' prior immunized testimony. *Kastigar v. United States*, 406 U.S. 441, 461 (1972). "[A]wareness of the obstacles to successful prosecution of an immunized witness may force the prosecution to curtail its cross-examination of the witness in the case on trial to narrow the scope of the testimony that the witness will later claim tainted his subsequent prosecution." *United States v. Turkish*, 623 F.2d at 775. In addition, "defense witness immunity could create opportunities for undermining the administration of justice by inviting cooperative perjury among law violators." *Id.*

These concerns "are matters normally better assessed by prosecutors than by judges." *Id.* at 776.

> "An immunity decision . . . would require a trial judge, in order to properly assess the possible harm to public interests of an immunity grant, to examine pretrial all the facts and circumstances surrounding the government's investigation of the case. Such collateral inquiries would necessitate a significant expenditure of judicial energy, possibly to the detriment of the

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264 Cal.Rptr. at 376, italics added.

judicial process overall, and would risk jeopardizing the impartiality and objectivity of the judge at trial."

United States v. Thevis, 665 F.2d at 640.

We think that the conclusion of the Second Circuit in *Turkish* correctly states the law:

"Without precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it. The essential fairness required by the Fifth Amendment guards the defendant against overreaching by the prosecutor, and insulates him against prejudice. It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges."

Turkish at 777. Accordingly, the Second Circuit flatly precludes judicial immunity for a defense witness "whenever the witness for whom immunity is sought is an actual or potential target of prosecution." *Id.* at 778. Under this near-unanimous view, petitioner was not entitled to obtain immunity for Ms. Goldstein.

C. Petitioner Failed To Meet The Requirements Of *Government of Virgin Islands v. Smith*

Even if a sound argument could be made that the power to grant judicial immunity inheres in the Constitution to override a valid claim of privilege, this would be a particularly inappropriate case to decide the issue. Under the Third Circuit's standard,

immunity may be granted only if the proffered testimony is unambiguous, clearly exculpatory and not cumulative. *Government of Virgin Islands v. Smith*, 615 F.2d at 972. The California Supreme Court found it unnecessary to decide whether judicially conferred use immunity could ever be ordered for the very reason that petitioner's "offer of proof at trial in support of his request fell well short of the standards set forth in the one case which has clearly recognized such a right. . . .' *People v. Hunter*, 49 Cal.3d at 973-74, 782 P.2d at 616, 264 Cal.Rptr. at 375. The state court observed:

"As noted above, defense counsel's offer of proof was that Ms. Goldstein would testify defendant was depressed as a result of attending a funeral, and that he had made the statement, 'Why is it the good people die and the bad still live.' Even assuming that the proffered testimony was not inadmissible hearsay, it did not meet *Smith*'s requirement that the evidence be 'clearly exculpatory and essential.' At best, the evidence was cumulative of the extensive testimony of other defense witnesses. It was well established that defendant had been abused by his father. Furthermore, defendant's sister testified that she spoke with defendant the day after the murder, and recalled that defendant stated he was feeling depressed from having attended a funeral the previous day. In addition, Dr. Lunde, a psychiatrist, offered his expert opinion that defendant was clinically depressed on the day of the murder and could not, as a result, have committed a willful, deliberate and premeditated murder. In short, defendant failed to

demonstrate that the proffered testimony was 'clearly exculpatory and essential' to his defense."

Id. at 974, 782 P.2d at 617, 264 Cal.Rptr. at 376.

Petitioner disputes the state court's findings. Petition at 15-16. The state supreme court had before it the entire trial record. Its factual conclusions are fairly supported by that record. Certiorari should not be granted for the purpose of reassessing whether petitioner made an adequate offer of proof under the *Smith* standard. *See*, *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

D. <u>The Power To Grant Judicial Use Immunity Does Not Inhere In The Eighth Amendment</u>

Finally, petitioner argues that the trial court's failure to grant immunity at the penalty phase deprived him of his Eighth Amendment right to present all relevant mitigating evidence on the question of appropriate punishment. *See*, *Lockett v. Ohio*, 483 U.S. 586 (1976).

The state did not deprive petitioner of any relevant mitigating evidence. The decision not to testify was Ms. Goldstein's and hers alone. As the Second Circuit said of the Sixth Amendment right to compulsory process, it is difficult to see how the Eighth Amendment of its own force places upon either the prosecutor or the trial court an affirmative obligation to secure testimony from a defense witness by replacing the

protection of the self-incrimination privilege with a grant of immunity. *See*, *United States v. Turkish*, 623 F.2d at 773-74.

Moreover, the state supreme court concluded that the record simply did not show petitioner was deprived of relevant mitigating evidence.

> "Even assuming, without purporting to decide, that the trial court had the authority to confer use immunity on the proposed witness, we cannot conclude on this record that the court erred. There is nothing in the record to demonstrate defendant was denied highly relevant mitigating evidence, or to reveal the nature of that evidence. Even assuming that the evidence would have generally related to defendant's state of mind on the morning of the murder, we cannot find that the absence of Ms. Goldstein's testimony prejudiced defendant. The jury had already been presented evidence of defendant's purported depression at the guilt phase through the testimony of two psychiatrists. Moreover, defendant expressly indicated in his statement in allocution that his attendance at the funeral made him feel that 'it was unfair that [his] father was still alive.'"

People v. Hunter, 49 Cal.3d at 980-81, 782 P.2d at 621, 264 Cal.Rptr. at 380. Again, this Court does not grant certiorari to reassess the facts. *United States v. Johnson*, 286 U.S. at 227.

CONCLUSION

For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

DATED: July 13, 1990.

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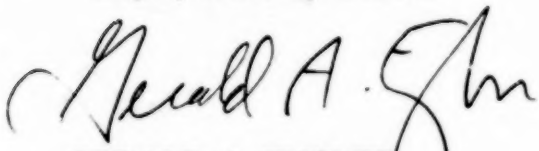

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SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE HUNTER *v.* CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 89-7671. Decided October 1, 1990

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, dissenting.

This petition for certiorari presents the significant issue whether, and under what circumstances, a criminal defendant has a constitutional right to judicially immunized testimony useful to establishing his defense. I have previously expressed my view that this Court should resolve the conflict of lower court authority on this question. See *Autry* v. *McKaskle*, 465 U. S. 1085, 1087–1088 and n. 3 (1984) (MARSHALL, J., dissenting from denial of certiorari). This petition underscores the importance of settling that conflict because it frames the issue in the most compelling possible setting: the penalty phase of a capital proceeding.

Petitioner was convicted of murder and sentenced to death. At trial, petitioner requested the court to confer use immunity upon his girlfriend, who declined on Fifth Amendment grounds to testify on petitioner's behalf. Petitioner proffered at both the guilt and the penalty phases that his girlfriend's testimony would show that petitioner was mentally distressed at the time of the charged murder. The trial court refused to grant immunity, and the California Supreme Court affirmed its ruling.

The manner in which the California Supreme Court disposed of petitioner's claim highlights the confusion engendered by this Court's failure to resolve definitively the judicial immunity issue. Noting the conflict among the lower courts, the California Supreme Court sought to avoid the question of a criminal defendant's constitutional right to judi-

cially immunized testimony by ruling that petitioner had failed to meet the threshold showing established by *Government of Virgin Islands* v. *Smith*, 615 F. 2d 964, 972 (CA3 1980), the first decision to recognize such a right. "[T]he proffered testimony," the court explained,

> "did not meet *Smith*'s requirement that the evidence be 'clearly exculpatory and essential.' At best, the evidence was cumulative of the extensive testimony of other defense witnesses." *People* v. *Hunter*, 49 Cal.3d 957, 974, 782 P. 2d 608, 617 (1989).

The court dismissed in similar terms petitioner's claim that he was entitled to have his girlfriend's immunized testimony as mitigating evidence during the penalty phase of the capital trial:

> "Even assuming, without purporting to decide, that the trial court had the authority to confer use immunity on the proposed witness, we cannot conclude on this record that the court erred. There is nothing in the record to demonstrate [petitioner] was denied *highly relevant* mitigating evidence, or to reveal the nature of that evidence. Even assuming that the evidence would have generally related to [petitioner's] state of mind on the morning of the murder, we cannot find that the absence of [the girlfriend's] testimony prejudiced [petitioner]. The jury had already been presented evidence of [petitioner's] purported depression at the guilt phase through the testimony of two psychiatrists." *Id.*, at 980–981, 782 P. 2d, at 621 (emphasis added).

In my view, the question whether petitioner had a right to judicially immunized testimony at the penalty phase of the proceedings cannot be avoided on these terms. The California Supreme Court was mistaken in presuming that it could resolve the disposition of petitioner's claim to judicially immunized testimony at the penalty phase of a capital proceeding by the same standard used to assess a defendant's right to

immunized testimony at trial. It is well-established that a criminal defendant's entitlement to present useful evidence is at its strongest in the capital sentencing context; this Court has repeatedly emphasized that the State may not exclude "*any* relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." *Penry* v. *Lynaugh*, 492 U. S. ——, ——, (1989) (emphasis added); accord, *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986); *Eddings* v. *Oklahoma*, 455 U. S. 104, 114–115 (1982). Assuming that a criminal defendant *does have* the due process right to judicially immunized testimony recognized by the Third Circuit in *Smith*, the assessment whether a capital defendant has satisfied the threshold showing of need must take account of that defendant's heightened entitlement to present *all* mitigating evidence to the sentencer. Cf. *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) (holding that exclusion of mitigating evidence at penalty phase of capital proceeding through operation of generally applicable state hearsay rule denied defendant "a fair trial on the issue of punishment" and thus violated due process). A court could not, in my view, deny the defendant's request, as the California Supreme Court did, simply because the mitigating testimony sought by the defendant was not "*highly* relevant" or because *overlapping* evidence "had already been presented" to the sentencer. In sum, *if* a defendant has a right to judicially immunized testimony, petitioner's death sentence cannot stand.

I would grant the petition so that this Court can determine whether a criminal defendant has a due process right to judicially immunized testimony, and, if so, what standards govern immunized-testimony requests in capital sentencing proceedings. Consequently, I dissent from the denial of certiorari.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would

also grant the petition and vacate the death penalty in this case even if I did not regard the petition as presenting a question independently meriting this Court's review.